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Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES

ZEINAB ALI,

Petitioner,

v.

ALAMO RENT-A-CAR, INC.,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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140 pp

QUESTION PRESENTED

Where an employer imposes an employment directive that fails to reasonably accommodate the religious practice of an employee, does Title VII provide redress only if the employee chooses to disobey and is then disciplined for that violation?

PARTIES

The parties to this action are set forth in the caption.

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Petitioner Zeinab Ali respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on March 6, 2001.

OPINIONS BELOW

The March 6, 2001, opinion of the court of appeals, which is reported at 2001 WL 218788 but is not officially reported, is set out at pp. 1a-8a of the Appendix. The December 7, 1999, Memorandum Opinion of the district court, which is not reported, is set out at pp. 9a-12a of the Appendix. The December 3, 1999, oral opinion of the district judge, which is not reported, is set out at pp. 13a-14a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on March 6, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

Section 2000e-2(a)(1) of 42 U.S.C. provides in pertinent part:

> It shall be an unlawful employment practice for an employer--(1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . .

Section 2000e(j) of 42 U.S.C. provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

STATEMENT OF THE CASE

Petitioner Zeinab Ali, an American citizen originally from Somalia, is a devout Muslim.[1] The tenets of her faith require her to keep her head fully covered in the presence of men other than members of her immediate family.[2] Petitioner

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[1]The facts set out in the Statement are those alleged by petitioner in the courts below. Her complaint was dismissed for failure to state a claim on which relief could be granted.

[2]The long history of this practice is described in The Encyclopedia of Islam, v. 5, pp. 734 *et seq.* (1986).

ordinarily wears a traditional scarf known as a hijab,[3] which covers her hair and her neck. Adherence to this practice is of particular importance during the month of Ramadan, when Muslims are enjoined to be especially faithful to their religious obligations.

In the summer of 1996, Ms. Ali was hired as a management trainee at an Alamo rental office in Arlington, Virginia. During the initial period of her employment she wore her religiously mandated head scarf without incident; petitioner's supervisors did not initially object to or criticize her scarf. In December, 1996, however, Ms Ali's immediate supervisor was replaced by H. Scott Cooper. Shortly after his appointment, Mr. Cooper directed Ms. Ali not to wear her scarf, objecting that it made her look different than other employees. Ms. Ali explained to Cooper that her scarf was required by her religion, and that fulfillment of her religious duties was particularly important because it was then Ramadan. Cooper stood by his prohibition, and admonished Ali to think about the matter over the weekend.

When Ms. Ali returned to work still wearing the head scarf, Cooper summarily transferred her to a different position in which she would have little contact with customers. Ms. Ali, fearful that she would be dismissed if she persisted, then relented. She replaced the full head covering dictated by her faith with a far smaller, more revealing kerchief.

Compliance with Cooper's demand entailed a very serious violation of Ms. Ali's religious obligations. She complained repeatedly about the prohibition both to Mr. Cooper and to his superiors at Alamo, but without success. Throughout the rest of her employment by Alamo, petitioner continued to comply under

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[3] See http://www.islamzine.com/hijab; http://www.islam101.com/women/hijabaq.html.

protest with Cooper's prohibition. She eventually was terminated by Alamo as part of a reduction in force.

Petitioner filed a timely charge with the Equal Employment Opportunity Commission ("EEOC") alleging that Cooper's directive, which he and his superiors knew required her to violate her fundamental religious beliefs, violated Title VII of the 1964 Civil Rights Act. In July, 1999, petitioner brought suit under Title VII in the federal district court for the Eastern District of Virginia, seeking, inter alia, compensatory and punitive damages.

Alamo moved to dismiss the complaint for failure to state a claim for which relief could be granted. Under controlling Fourth Circuit precedent, Alamo argued, a Title VII religious accommodation claim can be brought only where an employer has dismissed or otherwise disciplined a plaintiff because that employee insisted on adhering to his or her religious practices in violation of the employer's requirements.

> Defendant moves for dismissal of Plaintiff's complaint on the sole ground that she cannot in good faith allege that she suffered an "adverse employment action" which is necessary to state a claim for religious discrimination under Title VII of the Civil Rights Act as a matter of law. In this jurisdiction, in order to plead a claim for failure to accommodate a religious belief, an employee must demonstrate the following elements: 1) that she has a bona fide religious belief that conflicts with an employment requirement; 2) that she has informed her employer of this belief; and 3) that she was ***disciplined*** for failure to comply with the conflicting employment requirement. *Chalmers v. Tulon Co.*, 101 F. 3d 1012 (4th Cir. 1996)

> (emphasis added). Even assuming all facts and inferences in the light most favorable to the Plaintiff, she has no evidence that she suffered any adverse employment action . . . .

(Defendant's Memorandum and Authorities in Support of Motion to Dismiss, p. 5) (Emphasis in original).

Ali contended, to the contrary, that Title VII accorded relief where, as here, an employee in order to avoid just such disciplinary action had acceded to her employer's demands that she violate her religious obligations.

> Ms. Ali was told by her new supervisor not to wear her head scarf at work. She protested, to no avail. Rather than risk the loss of her job, and in the hope of appeasing her supervisor, Ms. Ali reluctantly and with misgivings replaced the full head covering she had been wearing with a smaller, less obtrusive one, in derogation of her religious obligations. . . . She could not be disciplined for failure to comply for she chose instead to comply in an effort to avoid the threatened disciplinary sanction.
>
> But this does not mean she suffered no harm. To the contrary, she suffered grievous religious harm when, during the month of Ramadan, she was unable to wear the prescribed head covering during her hours of employment. She subordinated the demands of her religion to those of her employer. Employee[s] cannot legally be forced to accept such harm as a condition of invoking Title VII's protections against religious discrimination. . . . By defendant's theory, Ms. Ali could not seek the

> protections against religious discrimination codified in Title VII unless and until she challenged her supervisor and took whatever punishment followed.

(Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss, pp. 1, 5, 6).

After oral argument on the motion, the district court dismissed the complaint. The court accepted Alamo's contention that Title VII is violated only where an employee is disciplined for adhering to his or her religious practices.

> [T]his complaint is not sufficient in my view. It is a legally insufficient complaint. It has not adequately alleged what I believe you have to allege in the Fourth Circuit [which] is that an actual adverse action was taken.

(App. 12a). The district judge indicated that Ali could refile her complaint if she could allege that she had disobeyed her supervisor's orders and had as a result been subject to a "genuine adverse employment action." (*Id.*). The phrase "adverse employment action" in Fourth Circuit jurisprudence refers to dismissal, demotion, or other action by an employer adverse to a plaintiff's economic interests. *E.g., Page v. Bolger,* 645 F. 2d 227, 233 (4th Cir. 1981).

Ali moved for reconsideration, conceding that she had not been subjected to dismissal or other "adverse employment action," but insisting that under Title VII she could obtain redress for the employer-imposed interference with her religious obligations.

> In the case at bar, Ms. Ali was directed to remove her religiously-mandated head-scarf at work. . . . She substantially complied, and for purposes of the adjudication at bar has claimed no work-related detriment. She claims, however, grievous religious injury imposed by her employer.

(Motion to Amend Judgment, pp. 3-4). The district court, however, adhered to its earlier decision, treating as dispositive the fact the Ali had not been disciplined.

> [T]he amended complaint . . . failed to allege the elements of a prima facie case under Title VII in that plaintiff did not allege any adverse employment action. . . . [P]laintiff has even admitted that "for the purposes of this adjudication at bar [she] has claimed no work-related detriment." . . . Thus, it is clear by plaintiff's own admission that the first amended complaint, as currently pled, fails to state a cognizable claim.

(App. 9a-11a).

On appeal Ali reiterated her contention that Alamo's interference with her religious obligations was itself actionable under Title VII.[4] The Fourth Circuit, however, held that Title

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[4]Brief of Appellant, No. 00-1041 (4th Cir.), pp. 7 ("Ms. Ali's complaint, notwithstanding the absence of work-related detriment, meets all the required elements of a failure to accommodate claim. An employer's unwarranted abridgement of an employee's innocuous religious practice is sufficient to give rise to a claim."), 13 ("Ms. Ali did not receive the protection that the statute requires. She seeks to proceed on the merits in order to vindicate her right to appropriate religious observance at work and to offer proof of the damages she suffered by her employer's actions preventing same.")

VII is violated only where an employee is disciplined for disobeying a directive that she disregard her religious obligations, but not where the employee submits to that discriminatory directive.

> Ali sued her former employer, Alamo . . . , under Title VII for refusing to allow her to wear a head scarf at work that was mandated by her religion. The district court dismissed Ali's complaint for failure to allege that she suffered an adverse employment action. . . .
>
> Ali concedes that she did not suffer any legally cognizable adverse employment action. She claims, however, that Title VII religious discrimination claims do not require a showing of adverse employment action. . . . Title VII religious discrimination claims clearly require a showing of adverse employment action. . . .
>
> [T]he [religious] accommodation provision does not affect the basic statutory requirement for adverse employment action. . . . Title VII only prohibits employer practices where the employer discriminates on the basis of religion ***and*** the employee suffers an adverse employment action.

(App. 3a-6a) (Emphasis in original).

REASONS FOR GRANTING THE WRIT

THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF LAW IN A MANNER THAT CONFLICTS WITH DECISIONS OF SEVERAL CIRCUITS AND WITH DECISIONS OF THIS COURT

This case presents a recurring and important question regarding the religious accommodation provision of Title VII. When employees of faith face an employment rule that conflicts with their religious obligations, those workers respond in one of two ways. Some defy their employer's directive, risking and usually incurring dismissal, while others do as ordered, temporarily subordinating their religious duties to their need for employment. The Fourth Circuit holds that only the defiant employees can sue under Title VII; other circuits, not surprisingly, afford judicial relief as well to employees who comply with their employers' directives pending resolution of their Title VII claims. The United States, both in its capacity as a plaintiff and in its capacity as an employer-defendant, has adhered to the broader interpretation of the religious accommodation provision of Title VII.

The Fourth Circuit decision in this case stems from a decision five years earlier in *Chalmers v. Tulon Co. of Richmond*, 101 F. 3d 1012 (4th Cir. 1996).

> To establish a prima facie religious accommodation claim, a plaintiff must establish that: "(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was ***disciplined for failure to comply*** with the conflicting employment requirement."

101 F. 3d at 1019 (Emphasis added). This formulation of the essential elements of a prima facie case can be satisfied only where there has been both a refusal to comply and resulting discipline; an employee who obeys under protest cannot obtain relief under Title VII. *See Cary v. Anheuser-Busch, Inc.*, No. 95-3154, 1997 WL 342593 *2 (4th Cir. June 23, 1997) (same).[5]

The decision in the instant case applies the Fourth Circuit precedent in *Chalmers*. Had petitioner insisted on wearing the complete head covering mandated by her religious beliefs, in defiance of her supervisor, and as a consequence been dismissed or demoted, she would have been permitted under *Chalmers* to sue for injunctive and monetary relief. But under the decision below petitioner forfeited her Title VII right to reasonable accommodation when, in order to protect her job, she chose instead to comply under protest with that supervisor's prohibition. In most circuits the only prerequisites to a Title VII religious accommodation action are the filing of a timely charge and a timely civil action; in the Fourth Circuit, however, there are two additional prerequisites--defiance and discipline. Under the decision below Title VII simply is not violated where, as here, an employer by engaging in intentional discrimination *succeeds* in coercing an employee into violating her religious beliefs.

The Sixth and Eighth circuits have a similarly restrictive interpretation of Title VII. *E.g., Johnson v. Angelica Uniform Group, Inc.*, 762 F. 2d 671, 673 (8th Cir. 1985) (plaintiff "must plead and prove" discipline by employer); *Brown v. General Motors Corp.*, 601 F. 2d 956, 959 (8th Cir. 1979) (same). A recent lower court decision in the Sixth Circuit illustrates with stark

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[5]"To establish a *prima facie* case of religious discrimination under Title VII, the plaintiff must: (1) have a bona fide religious belief which conflicts with an employment requirement; (2) inform the employer of the belief; and (3) be disciplined for failing to comply with the conflicting requirement."

clarity the meaning and application of the narrow interpretation of Title VII in the Sixth as well as the Fourth Circuit. The plaintiff in that recent case, a Seventh Day Adventist, had sought an adjustment in her work schedule so that she could observe the Sabbath from sundown Friday until sundown on Saturday. When her employer insisted that she work on the Sabbath, the plaintiff obeyed and sued, inter alia, for injunctive relief. The court--like the Fourth Circuit in the instant case--held that the plaintiff's failure to disobey her employer's directives was fatal to her Title VII claim.

> Plaintiff almost entirely acceded to her employer's insistence that she work a schedule that conflicted in part with her Sabbath. . . . By agreeing to work on her Sabbath, . . . Plaintiff avoided suffering any adverse *employment* consequences as a result of her religious beliefs; rather, her personal religious observance suffered on account of her adherence to her work schedule. Yet, Title VII protects only the former, employment-related interests from abridgement. . . . Plaintiff must have suffered a "materially adverse" change in the terms or conditions of her employment, such as termination, demotion, decreased wages, a less distinguished title, a material loss of benefits, or significantly diminished responsibilities. . . . [A]lthough Plaintiff's religious beliefs ostensibly conflicted with the demands of her job, she subordinated the former to the latter, thereby avoiding a conflict which otherwise might have led her employer to take adverse action against her. . . . Plaintiff's failure to insist upon strict adherence to these beliefs, even at the cost of

> negative job consequences, effectively absolved her employer of the responsibility to reasonably accommodate her beliefs.

Stone v. West, 133 F. Supp. 2d 972, 985-986 (E.D. Mich. 2001). Significantly, the Department of Justice, which represented the defendant in *Stone v. West*, had declined to defend the action on this basis. *Id.* at 985.

Most circuits, however, have rejected this narrow reading of Title VII. The Ninth Circuit construes Title VII, not as a mere limitation on employer disciplinary action, but as an affirmative obligation on "an employer to make reasonable accommodations to their employees' religious beliefs, unless such accommodations to an employee's religious observance or practice would cause undue hardship." *Hudson v. Western Airlines, Inc.*, 851 F. 2d 261, 265 (9th Cir. 1988). In *EEOC v. Townley Engineering & Mfg. Co.*, 859 F. 2d 610 (9th Cir. 1988), the Ninth Circuit upheld the issuance of an injunction forbidding the employer from requiring workers to attend weekly prayer services. The aggrieved employee in *Townley* had attended those services as required, while simultaneously complaining to the EEOC. The court of appeals explained that "[a]n employee does not cease to be discriminated against because he temporarily gives up his religious practices and submits to the employment policy." 859 F. 2d at 614 n. 5. In *American Postal Workers Union v. Postmaster General*, 781 F. 2d 772 (9th Cir. 1986), the individual plaintiffs, although objecting on religious grounds to processing draft registration forms, had complied under protest with the directives of the Postal Service. The Department of Justice, representing the Postal Service, "concede[d] that [the plaintiffs] established a *prima facie* case of religious discrimination by demonstrating that they held a bona fide religious belief which prohibited them from processing draft registration forms." *Id.* at 775. The court of appeals held broadly that "where a certain

aspect of an employment situation creates a religious conflict for a particular employee, the employer must take some initial step to reasonably accommodate the religious belief of that employee." *Id.* at 776.

Similarly, the Fifth Circuit holds that Title VII imposes on employers an obligation to accommodate workers' religious views, not merely a limitation on disciplinary measures. "Title VII obligates an employer to 'reasonably accommodate' an employee's religious observance or practice unless doing so poses undue hardship to the employer's business." *Equal Employment Opportunity Commission v. Universal Mfg. Corp.*, 914 F. 2d 71, 72 (5th Cir. 1990). In *Cooper v. General Dynamics, Convair Aerospace Div.*, 533 F. 2d 163 (5th Cir. 1976), the court permitted suit by two Seventh Day Adventists who objected to paying union dues, even though they had not been disciplined for refusing to do so. *Id.* at 165 n. 3. "If the employee's conduct is religiously motivated, his employer must tolerate it unless doing so would cause undue hardship to the conduct of his business." *Id.* at 168. The court thus concluded that the plaintiffs in *Cooper* had established a prima facie case, and remanded for consideration of whether the requested accommodation would impose undue hardship. *Id.* at 171.

The Seventh Circuit also holds that "[u]nder Title VII . . . an employer must reasonably accommodate an employee's religious observance or practice unless it can demonstrate that such accommodation would result in an undue hardship to the employer's business." *Rodriguez v. City of Chicago*, 156 F. 3d 771, 775 (7th Cir. 1998). The plaintiff in *Rodriguez* was a Roman Catholic police officer who objected on religious grounds to guarding abortion clinics; the plaintiff had carried out such assignments under protest, and sued for prospective injunctive relief. Under those circumstances "the City had conceded that Officer Rodriguez had established a prima facie case of religious

discrimination." *Id.* at 774. Similarly, in the Third Circuit a plaintiff establishes a prima facie case by "demonstrat[ing] that a religiously motivated practice conflicts with an employment requirement." *United States v. Board of Educ. for the School Dist. of Philadelphia*, 911 F. 2d 882, 886 (3d Cir. 1990).

The Fourth Circuit case law relies on a semantic sleight of hand to mask the fundamental difference between the rule in this case and *Chalmers* and the standard prevailing in most other circuits. The critical difference concerns whether proof of discipline against a non-complying employee is the *sole* method of establishing a prima facie case, or merely *one* possible method of doing so. In *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F. 2d 1022, 1026 (5th Cir. 1984), and *Philbrook v. Ansonia Bd. of Educ.*, 757 F. 2d 476, 481 (2d Cir. 1985) (*quoting Turpen*), *aff'd on other grounds*, 479 U.S. 60 (1986), proof of discipline was simply described as one such way in which a plaintiff could establish a prima facie case:

> A plaintiff in a [Title VII] case *makes out* a prima facie case of religious discrimination by proving (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting employment requirement.

(Emphasis added). In the *Chalmers* formulation, however, the prefatory language prior to "(1)" was replaced with a very different formulation: "To establish a prima facie religious accommodation claim, a plaintiff *must* establish." 101 F. 3d 1019 (Emphasis added). A methodology that is merely permissible in the Second and Fifth circuits thus becomes exclusive and mandatory in the Fourth Circuit. (There is a world of difference

between saying "a taxi gets from the Capitol to the White House by driving down Pennsylvania Avenue" and "a taxi going from the Capitol to the White House *must* drive down Pennsylvania Avenue.")

The decision of the Fourth Circuit is flatly inconsistent with this Court's decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1976). The central holding of the Fourth Circuit is that Title VII does not actually impose on employers a requirement that they reasonably accommodate the religious practices of their employees. Rather, that circuit insists, Title VII only forbids employers from using discipline to enforce non-accommodating work rules. In the Fourth Circuit non-accommodation is entirely lawful under Title VII, even discriminatory practices adopted out of animus towards a particular religion; federal law does no more than prevent employers from retaliating against employees who do not give in to their employers' demands. This interpretation of the reasonable accommodation provision of Title VII is contrary to the holding in *Hardison*:

> The intent and effect of th[e] definition [of religion in 42 U.S.C. 2000e(j)] was to make it an unlawful employment practice under § 703(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees.

432 U.S. at 74. Under *Hardison*, a Title VII violation occurs when an employer refuses to make the required accommodation, regardless of whether the victim defies or succumbs to the

unlawful directive.[6] The decision below requires a plaintiff to prove both that "the employer discriminates on the basis of religion *and* the employee suffers an adverse employment action." (App. 6a) (Emphasis in original). *Hardison* squarely holds, to the contrary, that proof of the first element alone is entirely sufficient.

More broadly, the Fourth Circuit's decision is expressly based on the view that Title VII protects only a worker's economic interests, reaching only "adverse employment actions" such as dismissals, demotions, or denials of employment or promotion. On this view, Title VII simply does not apply where an employer takes actions which, although adverse in some other sense, do not affect the discrimination victim's employment, income, or promotion prospects. "[A]n employee who claims that she faced discrimination on the basis of race, color, sex, or national origin must show that she suffered some type of adverse employment action." (App. 4a). This Court has emphatically rejected that narrow view of the protections of Title VII. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), no adverse employment action was even alleged; the plaintiff remained on her job for years, was repeatedly promoted, and it was "undisputed that her advancement there was based on merit alone." 477 U.S. at 60. The injury at issue in *Meritor* was non-economic; Mechelle Vinson was allegedly raped, forcibly fondled, and coerced into a sexual relationship with her supervisor. The employer in *Meritor* insisted that Title VII had not been violated because Ms. Vinson could not prove any "job-related detriment" involving "tangible, economic benefits." (Brief for Petitioner,

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[6]Similarly, *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 70 (1987), noted that "[i]n enacting § 701(j), Congress was understandably motivated by a desire to assure the individual additional opportunity to observe religious practices." That purpose assuredly is as applicable where, as here, the individual is forced to abandon those religious practices, as it is in a case in which the individual remains observant but loses his or her job.

No. 84-1979, pp. 30-37). The employer contended that Title VII would not be violated if a woman gave in to her supervisor's sexual demands in order to keep her job, but only if she were disciplined for spurning those advances.[7] This Court emphatically rejected that argument. "[T]he language of Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." 477 U.S. at 64, *quoting Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13 (1978).

Under the decision of the Fourth Circuit, Title VII – absent economic reprisals – protects an employee's sexual autonomy, but not her religious practices. If the supervisor in the instant case had forbidden Ms. Ali to wear a brassiere and she had complied under protest with that directive, the existence of actionable discrimination would have been indisputable. It is simply inconceivable that the protections afforded by Title VII discriminate against workers of faith.

The Fourth Circuit decisions in the instant case and in *Chalmers* have largely nullified for the workers in that circuit the Title VII protections against discrimination on the basis of religion. Under those decisions Title VII simply does not apply to successful efforts to interfere with a worker's religious observances. For employees who cannot afford to risk the dismissal that is usually precipitated by defiance of an employer's rules, the requirement of reasonable accommodation no longer

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[7]Brief for Petitioner, No. 84-1979, p. 36 ("Given the range of relief available for Title VII grievances . . . a victim of harassment does not materially increase her risk by refusing the advances . . . . [I]f reprisal follows, appropriate job-related remedies are at hand. Reprisal for the exercise of Title VII rights is itself a violation of Title VII, § 704(a).")

exists. Employers are expressly at liberty to interfere deliberately, even maliciously, with the religious observances and obligations of any worker who cannot risk economic martyrdom.

The vitality of Title VII's religious accommodation guarantee is of increasing importance in our ever more diverse society. A generation ago many employers had not encountered workers whose religious affiliations were neither Christian nor Jewish. Even in that era, Congress concluded that the religious accommodation provision of Title VII was necessary to protect the religious freedom of American workers. Today the American workforce includes rapidly increasing numbers of Muslims, Buddhists, Sikhs, and countless other denominations, many of whose beliefs and practices may be unfamiliar to supervisors of European ancestry. The risk of intolerance and of indifferent interference with religious observance are unavoidably increased by these sea changes in our society.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Case No. 00-1041

ZEINAB ALI,
Plaintiff-Appellant,

v.

ALAMO RENT-A-CAR, INCORPORATED,
Defendant-Appellee,

and

H. SCOTT COOPER,
Defendant.

METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION; AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INCORPORATED; THE AMERICAN JEWISH COMMITTEE,
Amici Curiae.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Leonie M. Brinkema, District Judge.
(CA-99-1025-A)

Argued: December 4, 2000

Decided: March 6, 2001

Before WILKINSON, Chief Judge, and LUTTIG and MICHAEL, Circuit Judges.

COUNSEL

ARGUED: Kelly Marie Baldrate, VICTOR M. GLASBERG & ASSOCIATES, Alexandria, Virginia, for Appellant. Karen Ann Khan, JACKSON, LEWIS, SCHNITZLER & KRUPMAN, Washington, D.C., for Appellee. ON BRIEF: Victor M. Glasberg, VICTOR M. GLASBERG & ASSOCIATES, Alexandria, Virginia, for Appellant. Robert A. Hirsch, JACKSON, LEWIS, SCHNITZLER & KRUPMAN, Washington, D.C., for Appellee. Woodley B. Osborne, OSBORNE & DEUTSCH, Washington, D.C., for Amici Curiae.

OPINION

PER CURIAM:

Zeinab Ali sued her former employer, Alamo Rent-A-Car, Inc. (Alamo), under Title VII for refusing to allow her to wear a head scarf at work that was mandated by her religion. The district court dismissed Ali's complaint for failure to allege that she suffered an adverse employment action. Ali now appeals, arguing that Title VII religious discrimination claims do not require a showing of adverse employment action. We affirm.

I.

We accept the well-pleaded facts in Ali's complaint and recite them in the light most favorable to her. *See Brooks v. City of Winston-Salem*, 85 F.3d 178, 181 (4th Cir. 1996). In August 1996 Alamo hired Ali as a management trainee. While on the job, she wore a head scarf along with her company uniform. She wore the head scarf in accordance with her Islamic religious beliefs. In December 1996 H. Scott Cooper became Ali's new supervisor. Cooper told Ali that she would have to stop wearing the head scarf or be transferred to a position in which she would not be in frequent contact with customers. Ali refused to stop wearing a scarf, and Cooper transferred her.[1]

Ali sued Alamo, claiming that Alamo's refusal to allow her to wear a head scarf was employment discrimination in violation of Title VII. The district court dismissed Ali's complaint for failure to allege an adverse employment action. The court gave Ali eleven days to refile a complaint alleging such action. Ali concluded that she could not meet this circuit's standard for an adverse employment action. Therefore, instead of refiling the complaint, Ali filed a motion to amend the judgment, arguing that Title VII religious discrimination claims do not require a showing of adverse employment action. The court denied the motion and Ali now appeals.

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[1]Alamo subsequently terminated Ali as part of a reduction in force. She concedes that her termination was lawful and unrelated to the events that form the basis for this suit.

II.

We review de novo the trial court's dismissal of Ali's complaint. *See Chisolm v. Transouth Fin. Corp.*, 95 F.3d 331, 334 (4th Cir. 1996). Ali claims that Alamo's refusal to allow her to wear a head scarf was in violation of 42 U.S.C. § 2000e-2(a). That section provides that it is an unlawful employment practice for an employer

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§ 2000e-2(a). Under this section an employee who claims that she faced discrimination on the basis of race, color, sex, or national origin must show that she suffered some type of adverse employment action. *See, e.g., Clearwater v. Indep. Sch. Dist.* #166, 231 F.3d 1122, 1127 (8th Cir. 2000) (race); *Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1125 (9th Cir. 2000) (national origin); *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999) (sex). The adverse employment action requirement is derived from the statute's requirement that the employer's practice relate to "compensation, terms, conditions, or privileges of employment" or that the practice "deprive any individual of

employment opportunities or otherwise adversely affect his status as an employee." § 2000e-2(a)(1) & (2). Ali concedes that she did not suffer any legally cognizable adverse employment action.[2] She claims, however, that Title VII religious discrimination claims do not require a showing of adverse employment action. In *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1019 (4th Cir. 1996), we said that a plaintiff in a Title VII religious discrimination case must show adverse employment action. Ali argues that *Chalmers* is not controlling because the question of whether adverse employment action is required was not squarely presented. In *Chalmers* the plaintiff had been fired and therefore satisfied the requirement. *See id.* at 1017. Ali, therefore, argues that *Chalmers*'s discussion of the adverse employment action requirement is dicta. We need not decide whether *Chalmers* is controlling because Title VII religious discrimination claims clearly require a showing of adverse employment action.

Section 2000(e)-2(a) joins religion with race, color, sex, and national origin in the same sentence. Because race, color, sex, and national origin require a showing of adverse employment action, Ali bears the burden of showing why religion should be treated differently. Ali argues that (1) the statutory definition of "religion," (2) legislative history, (3) Equal Employment Opportunity Commission (EEOC) regulations, (4) and case law all support the fact that religion, unlike the other bases for discrimination, does not require a showing of adverse employment action. We take up each of Ali's arguments in turn.

Ali claims that the accommodation provision in the statutory definition of "religion" dictates that religion should be treated differently. "Religion" is defined as including "all aspects

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[2]Because Ali concedes that she did not suffer any adverse employment action, we are not required to consider what actually constitutes adverse employment action under Title VII.

of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). Congress inserted the accommodation provision in the definition of religion in the wake of *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 330 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971). In *Dewey* the circuit court held that an employer does not discriminate on the basis of religion simply by failing to accommodate an employee's religious practice. In light of *Dewey* the accommodation provision is best seen as clarifying that an employer does discriminate on the basis of religion if it can accommodate the religious practice without undue hardship. However, the accommodation provision does not affect the statute's underlying requirement that the employer's discriminatory practice relate to "compensation, terms, conditions, or privileges of employment" or that the practice "deprive any individual or [sic] employment opportunities or otherwise adversely affect his status as an employee." §2000e-2(a)(1) & (2). In other words, the accommodation provision does not affect the basic statutory requirement for adverse employment action. As with sex, race, color, and national origin, a plaintiff claiming religious discrimination under Title VII must show adverse employment action. Title VII only prohibits employer practices where the employer discriminates on the basis of religion *and* the employee suffers an adverse employment action. Therefore, Ali's reliance upon the accommodation provision in the definition of religion is misplaced.

Ali also relies upon the legislative history accompanying the adoption of the accommodation provision in an attempt to show that religious discrimination claims do not require a showing of adverse employment action. Ali cites to the history in which Congress expressed concern with the *Dewey* decision. *See, e.g.*, 118 Cong. Rec. 706 (1972) (statement by Sen. Randolph). Again, in *Dewey* the circuit court held that an employer does not discriminate on the basis of religion simply by failing to accommodate an employee's religious practice. We do not question that Congress adopted the accommodation provision in response to the *Dewey* decision. However, as discussed above, Congress's concern about the *Dewey* decision is not inconsistent with Title VII's requirement for adverse employment action. Therefore, the legislative history does not show that Congress intended to allow an employee to recover for religious discrimination under Title VII without showing an adverse employment action.

Ali also cites to the EEOC regulations implementing Title VII with respect to religious accommodation. The regulations, however, simply track the language of the accommodation provision in the statutory definition of religion. See 29 C.F.R. § 1605.2. The regulations do not address whether an adverse employment action is required.

Finally, Ali argues that a few cases stand for the proposition that a showing of adverse employment action is not required in Title VII religious discrimination cases. However, none of the cases she cites stand for, or even suggest, such a proposition. For example, Ali relies upon *Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998). In *Rodriguez* the plaintiff police officer, who was Catholic, objected to being assigned to guard abortion clinics. The officer was employed throughout the litigation. Because the officer remained employed, Ali argues that Rodriguez held that a showing of

adverse employment action is not required. However, *Rodriguez* rejected the plaintiff's claim on an alternative ground without ever reaching the question of whether a showing of adverse employment action is required. *See id.* at 776. *Rodriguez*, therefore, is of no help to Ali.

In conclusion, a Title VII plaintiff claiming discrimination on the basis of religion must allege adverse employment action in order to survive a motion to dismiss under Rule 12(b)(6). The judgment of the district court is therefore

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

C.A. #99-1025-A

ZEINAB ALI,
Plaintiff,

v.

ALAMO RENT-A-CAR, INC.,
Defendant.

MEMORANDUM OPINION AND ORDER

By Order of December 3, 1999, this Court granted defendant's Motion to Dismiss and dismissed plaintiff's first amended complaint, without prejudice. Now pending before the Court is plaintiff's Motion to Amend Judgement pursuant to Fed. R. Civ. P. 59(e). For the following reasons, the Motion is DENIED.

Rule 59(e) provides a mechanism whereby an aggrieved party may petition the Court to alter or amend a judgment to accommodate an intervening change in controlling law, to account for new evidence not available at trial, or to correct a clear error of law or prevent manifest injustice. *See Thompson v.*

Direct Impact Co., 63 F. Supp. 2d 721 (E.D. Va. 1998). None of these circumstances exists in the present action to warrant a reversal of our ruling.

Plaintiff's primary contention is that we erred in ruling "that it does not violate [Title VII] for an employer to require an employee to abandon a mandatory religious observance at work, notwithstanding that the observance in no way interferes with the employee's work or the employer's mission." This assessment of our ruling is plainly incorrect because, when considering a motion to dismiss under Fed. R. Civ. P. 12(b) (6), a court does not resolve factual disputes, the merits of a claim, or the applicability of defenses; it simply tests the sufficiency of a complaint. *See Republican Party of North Carolina v. Martin*, 980 F. 2d 943, 952 (4th Cir. 1993). We dismissed the amended complaint because it failed to allege the elements of a prima facie case under Title VII in that plaintiff did not allege any adverse employment action.[1]

Without direct legal authority, plaintiff argues that it is incongruous with the purposes of Title VII that a claimant who refuses to acquiesce to an employer's demand that interferes with her religious practice must wait and suffer actual work- related injury in order to have standing to bring suit. The cases upon which plaintiff attempts to rely, *EEOC v. Ithaca Industries, Inc.*, 849 F. 2d 116 (4th Cir. 1988) and *Opuku-Boateng v. California*, 95 F. 3d 1461 (9th Cir. 1996), are distinguishable because they involve employees who alleged adverse employment action,

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[1]To state a claim for failure to accommodate a religious belief, an employee must demonstrate that: (1) she has a bona fide religious belief that conflicts with an employment requirement; (2) that she has informed her employer of this belief; and (3) that she was disciplined for failure to comply with the conflicting employment requirement. *See Chalmers v. Tulon Co.*, 101 F. 3d 1012 (4th Cir. 1996).

respectively being terminated and denied a promotion. Thus, these plaintiffs did sufficiently allege a prima facia case, enabling their complaints to proceed to the summary judgment stage. *See Rodriguez v. City of Chicago*, No. 95 C 5371, 1996 WL 22964, at *3 (N.D. Ill. January 12, 1996). Although it may be true that alleging actual injury is unnecessary for a claim to cognizable under Title VII, as pointed out by the district court in *Rodriguez*, a plaintiff must at the very least indicate what adverse employment action was threatened. *Id.* ("the threat of discharge (or of other adverse employment practices) is a sufficient penalty to establish the third element of the prima facie case"). We dismissed plaintiff's case because, even under the broad notice pleading requirements of Rule 8, she has not satisfied the requirement that she allege an actual or threatened adverse employment action.

To the contrary, the first amended complaint merely alleges that plaintiff was told she would be placed in a position with less customer contact or visibility if she did not remove her head scarf. Nothing in the complaint alleges that this threat of a change of job duties constituted potential adverse action. *See Jenkins-Allen v. Powell Duffryn Terminals, Inc.*, 18 F. Supp. 2d 885, 893 (N.D. Ill. 1998). Plaintiff has not alleged that the threatened position would impact her ability to obtain a promotion or to get a raise, how that would affect her job title or description as an administrative supervisor, or in what other ways it would have been generally undesirable.[2] Our ruling is consistent with *Boone v. Goldin*, 178 F. 3d 253 (4th Cir. 1999), in which the Fourth Circuit observed:

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[2]We note that counsel discussed these types of allegations for the first time at the hearing. It is precisely these types of adverse threats which must be included in the complaint.

> Absent any decrease in compensation, job title, level of responsibility, or opportunity for promotion, reassignment to a new position commensurate with one's salary level does not constitute an adverse employment action even if the new job does cause some modest stress not present in the old position. Because [plaintiff] has failed to allege that she suffered any adverse employment action, or to forecast any evidence of this, she cannot prevail on her claims of discrimination or retaliation.

178 F. 3d at 256-257. Indeed, plaintiff has even admitted that "for the purposes of this adjudication at bar [she] has claimed no work-related detriment." Mot. to Amend at 3. Thus, it is clear by plaintiff's own admission that the first amended complaint, as currently pled, fails to state a cognizable claim. Accordingly, it is hereby

ORDERED that plaintiff's Motion to Amend Judgment be and is DENIED.

The Clerk is directed to forward copies of this Order to counsel of record and to remove argument of this motion from the December 10, 1999 docket.

Entered this 7th day of December, 1999.

/s/
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

C.A. #99-1025-A

ZEINAB ALI, Plaintiff, v. ALAMO RENT-A-CAR, INC., Defendant.	• Alexandria, Virginia • December 3, 1999 • 10:00 a.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

THE COURT: All right. Well, what I'm doing is this complaint is not sufficient in my view. It is a legally insufficient complaint. It has not adequately alleged what I believe you have to allege in the Fourth Circuit is that an actual adverse action was taken.

I'm going to dismiss the complaint without prejudice and give you 11 days in which to refile, but I think under rule 11, you have got to conduct -- and I would hope, Ms. Khan, you might -- it's to your client's benefit to talk with counsel, give them

what information they need. It sounds to me based on what I've heard this morning is that you do not have sufficient evidence of any genuine adverse employment action.

In the Fourth Circuit, simply changing a person's job assignment, unless it has a negative impact on their career development or changes in the condition of their salary, it has to be a significant, not a minor, change in the terms and conditions of employment, even if it was related to an impermissible motive, in order for it to amount to a cognizable Title VII lawsuit.

So you have leave to refile the complaint within 11 days if you can do so within the strictures of rule 11.

[Transcript at page 25]

Supreme Court, U.S.
FILED
JUL 20 2001
CLERK

(2)

No. 00-1813

In The
SUPREME COURT OF THE UNITED STATES

ZEINAB ALI,
Petitioner,

v.

ALAMO RENT-A-CAR, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENT ALAMO RENT-A-CAR, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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39 pp

QUESTION PRESENTED
(Restated)

Whether this Court should grant certiorari for the purposes of addressing the administration of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, where the district court was required to dismiss Petitioner's claims, and where Petitioner was afforded adequate review at the circuit court level?

PARTIES

Alamo Rent-A-Car, Inc., is a corporation organized under the laws of Delaware and is a wholly owned subsidiary of ANC Rental Corporation. The caption of this case does not list all parties in the proceeding below. The names of all original parties are listed in the Fourth Circuit's caption to its opinion, appearing in Petitioner's Appendix at 1a. *See also Ali v. Alamo Rent-A-Car, Inc.*, 246 F.3d 662 (4th Cir. 2001)(unpublished).

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JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254. The decision under review from the United States Court of Appeals for the Fourth Circuit was rendered on March 6, 2001.

COUNTER-STATEMENT OF THE CASE

The Petition contains various omissions, misstatements and errors concerning the underlying facts and procedural history of this case, which was brought pursuant to The Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, ("Title VII"). In particular, Respondent does not agree that Petitioner's statement of the case (Petition at 2-3) or analysis of the factual basis for the Fourth Circuit's affirmation of the district court's order dismissing this case under Federal Rule of Civil Procedure 12(b)(6) (Petition at 4-5) presents a fair review of the record.[1]

Respondent Alamo Rent-A-Car, Inc., adopts the facts set forth in Petitioner's amended complaint, which, surprisingly, was not appended to the Petition. (See Respondent's Appendix at 1a). Respondent notes that the statement of facts set forth by the Fourth Circuit were based on the "well-pleaded facts in [Petitioner's] complaint" and were

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[1] Respondent objects to Petitioner's efforts to refer this Court to "The Encyclopedia of Islam" as factual predicate for this petition. (Petition at 2, fn. 2). Respondent also objects to Petitioner's efforts to incorporate the contents of a website titled www.islamzine.com into the factual recitation of the record. (Petition at 2, fn. 3). Respondent last objects to Petitioner citing selective portions of the parties' various briefs before the district court and Fourth Circuit as support for the statement of the case, since these assertions were not contained in the Amended Complaint. (Petition at 4, 5).

regarded "in the light most favorable to [Petitioner]." *Ali v. Alamo Rent-A-Car, Inc.*, 246 F.3d 662 (4th Cir. 2001)(unpublished)(Petitioner's Appendix at 3a).

REASONS FOR DENYING THE WRIT

This Court's review on a petition for writ of certiorari is not a matter of right, but of judicial discretion. The writ should be granted only "for compelling reasons." The Petitioner has failed to set forth any compelling reason why this Court should grant the writ, other than Petitioner's dissatisfaction with the result below. Petitioner's argument is at best a disingenuous attempt to recast her facts to and assert a split of authorities in the circuits where none exists. Even if Petitioner's rendition of the facts were accurate, which it is not, there exist insufficient grounds for review. The Petition also fails to address the procedural deficiencies in the appeal, which, when considered, makes the Fourth Circuit's unpublished decision a poor candidate for review.

I. NEITHER THE RECORD NOR THE DECISION BELOW RAISE THE QUESTION PRESENTED BY THE PETITION.

The instant Petition purports to raise the question of whether an employer violates the religious accommodation provisions of Title VII by unilaterally imposing an "employment directive" which has the effect of forcing an employee to subordinate her religious beliefs in order to remain employed. (Petition at i). Specifically, Petitioner, who is a devout Muslim, claims that her employer violated her religious beliefs by "directing" and "prohibiting" her from wearing a religiously mandated head covering during the month of Ramadan. Petitioner claims that when she refused to acknowledge this directive, she was transferred to a position

involving less customer contact. Ultimately, Petitioner asserts that she relented to the employment directive out of fear that "she would be dismissed" and that she was later terminated as a result of a reduction in force. (Petition at 3).

Unfortunately, the facts and issue presented here bear little resemblance to the record below. Initially, the Petition conveniently ignores the fact that the district court dismissed Petitioner's amended complaint upon a challenge under Federal Rule of Civil Procedure 12(b)(6), which tests the legal sufficiency of a pleading. *Hishon v. King & Spalding*, 467 U.S. 69 (1984). Yet, the Petition does not reference Federal Rule of Civil Procedure 12(b)(6). Additionally, since the underlying suit was dismissed for failure to state a claim upon which relief could be granted, it might be expected that the Petitioner would append the amended complaint, or at the very least, relevant portions thereof. The Petition does not. The reason? Petitioner does not want the allegations contained in the amended complaint to undercut her new rendition of facts asserted in the Petition.

A review of the amended complaint demonstrates that Petitioner was not subjected to an "employment directive" which required her to subordinate her beliefs in order to remain employed. To the contrary, Petitioner never alleged that she was ordered to remove her head covering or be terminated. According to the allegations of her amended complaint, her supervisor actually told her that she could *continue* adhering to her religious practices, albeit in a position with less customer contact. However, Petitioner failed to allege that the purported transfer would negatively affect the terms and conditions of her employment in any manner. In fact, Petitioner did not even allege that she was transferred to another position, yet alone that she suffered any form of adverse employment action as a result of wearing a full head covering. The only consequence

from the encounter with her supervisor pled by Petitioner was that she decided to wear a smaller head covering, subjectively believing that this would assuage any concerns of her supervisor.[2]

During the hearing on the motion to dismiss before the district court on December 3, 1999, Petitioner conceded that she suffered no adverse employment action. However, although Petitioner appended portions of the hearing transcript to her Petition, this particular segment was conveniently omitted. (Respondent's Appendix at 8a). Petitioner was further forced to concede during argument before the Court of Appeals that she did not suffer any adverse employment action and that her termination was lawful and unrelated to this suit. The Court of Appeals relied on these admissions in rendering its decision. *See Ali v. Alamo Rent-A-Car, Inc.*, 246 F.3d 662, fn. 1-2 (4th Cir. 2001)(unpublished)(Petitioner's Appendix at 3a-4a).

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[2] In her amended complaint, Petitioner suggests that there may have been other employment actions taken against her "...appearing to be in the nature of reprisals." Petitioner, however, did not allege these facts out of concern that she could not satisfy the dictates of Federal Rule of Civil Procedure 11. As noted in the amended complaint: "Discovery filed together with the complaint is intended to establish whether a sufficient basis exists, given Fed.R.Civ.P. 11, for Ms. Ali to allege discrete claims of retaliation in addition to the discrimination claim set forward in this complaint. This allegation and this footnote are intended to give Alamo notice of the plaintiff's potential legal claims in this regard, so it may take such discovery as it sees fit." (Respondent's Appendix at 4a, ¶13, fn. 1). These allegations were effectively withdrawn when Petitioner conceded both at the district court and at oral argument before the Fourth Circuit that she suffered no adverse employment action.

In all, the Petition is a transparent attempt to recast the facts of Petitioner's amended complaint and to avoid the admissions made both before the district court and Court of Appeals. Unfortunately for Petitioner, the issue raised in the Petition is borne out by neither the facts, the record, nor the decision below. The United States Supreme Court is not a forum for a "what if" scenario or for rendering an advisory opinion.

II. NO COMPELLING REASON EXISTS TO EXERCISE DISCRETIONARY REVIEW OF A PROCEDURALLY DEFECTIVE PETITION.

The Petition is procedurally flawed because Petitioner has waived the right to assert the question presented. By way of background, the district court initially dismissed the amended complaint for failure to state a claim upon which relief could be granted largely because of representations made by Petitioner at the December 3, 1999, hearing on the motion to dismiss. In arguments to the district court, Counsel for Petitioner represented that the Petitioner had, in fact, been "threatened" by her supervisor, "received some punishment" but admitted that "...we didn't plead what we considered to be adverse employment actions, because we weren't sure whether she was just subjectively perceiving them as adverse..." (Respondent's Appendix at 7a-9a). Based on these statements, the district court agreed to dismiss the amended complaint without prejudice, and gave Petitioner eleven days to file a second amended complaint to include the allegations made in open court.[3] Counsel for Petitioner gladly accepted the offer,

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[3] To further aid the Petitioner in her efforts to perfect the complaint, the district court further instructed Respondent to provide additional answers to discovery on the issue of her employment

as indicated in the relevant portions of the transcript, notably missing from Petitioner's appendix:

> [Petitioner]: ... We will file the amended complaint, and we will revisit the entire issues set before the court. The frailty that you see in the complaint is in accordance with –
>
> [The Court]: Look, notice pleading is wonderful, but it has to have enough meat on it to survive a motion to dismiss.
>
> [Petitioner]: Judge, I can't answer that without rearguing the issue that you have decided, and I don't wish to do that.
>
> [The Court]: All right.
>
> [Petitioner]: I take your point.
>
> [The Court]: – and I've put you on notice, but I'm telling you that this case better have a bit more to it than what it appears to be to it as I look at is, and, of course, in that

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history and company policies. (Respondent's Appendix at 10a). Respondent complied by providing supplemental discovery answers on December 8, 1999, well within the time given to Petitioner to amend the complaint as ordered by the district court.

> 11-day time period, there's also the opportunity to resolve the matter informally....
>
> [Petitioner]: I'll do that, Judge, and maybe if Ms. Baldrate has a hand in writing the complaint, it will be better than the one I wrote. Thank you.

(Respondent's Appendix at 11a).

Despite the representations made to the district court, Petitioner refused to file a second amended complaint. Instead, Petitioner inexplicably filed a motion to amend judgment under Federal Rule of Civil Procedure 59(e), even though there had never been an "entry of the judgment."[4] This motion, itself being procedurally defective, was denied by the district court on December 7, 1999. Petitioner never filed a second amended complaint within the time frame set forth by the district court. This failure raises a host of procedural flaws, including wavier and estoppel. Petitioner could have easily amended her complaint to plead the required elements to conform with the Fourth Circuit's standards, and attempted to prove her case under the alternative theory advocated in the Petition. In this manner, Petitioner could have preserved her appellate rights on this issue, but chose not to. As such, Petitioner has waived her right to challenge the validity of the *prima facie* requirements followed by every Circuit to consider the issue. The Petition is a very poor candidate for review.

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[4] The Petition wishfully refers to this as a request for reconsideration. (Petition at 5).

III. THE FOURTH CIRCUIT'S RULING IS NOT INCONSISTENT WITH OTHER CIRCUITS OR THE PRIOR DECISIONS OF THIS COURT.

In a transparent attempt to grab this Court's attention, Petitioner argues that the Fourth Circuit's ruling illustrates a significant split between the Circuits and deviation from prior Supreme Court precedent in addressing religious accommodation cases. This contention is meritless.

The entire basis for the Petition is that Petitioner was forced to "forfeit her rights to reasonable accommodation" under the statute. As noted above (Point I, *supra*), this rendition does not comport with the allegations in her own amended complaint. It is undisputed that Petitioner was never ordered to remove her full head covering under threat of losing her job. To the contrary, and by her own admissions, Petitioner was specifically given the opportunity to continue wearing her religious head covering. Viewed in the light most favorable to Petitioner, she could continue adhering to her religious practices, albeit in a position with less customer contact. According to her amended complaint, her supervisor gave her this choice and told her "to think about it" over the weekend. (Respondent's Appendix at 3a, ¶ 9).

Despite being afforded a choice, Petitioner asserts that this was an "employment directive," which had the discriminatory effect of requiring her to subordinate her religious beliefs to her need for employment. (Petition at 8, 9). Petitioner claims that this amounted to actionable "employer-imposed interference with her religious obligations." (Petition at 5). Petitioner's logic is flawed. Factually, given Petitioner's admission that she suffered no "adverse employment action," she is hardly in a position to assert that she was forced to

subordinate her beliefs in order to keep her job. Nor has Petitioner ever alleged that being removed from her existing position would affect the terms and conditions of employment or her career advancement. The district court recognized this, and allowed Petitioner the opportunity to amend her complaint to assert these claims. She refused. Absent some form of discipline or negative consequence, Petitioner could not establish a *prima facie* case necessary to trigger the burden-shifting obligations of accommodation followed by the Circuit Courts. Petitioner's rhetoric and unwarranted sarcasm that "non-accommodation is entirely lawful" in the Fourth Circuit conveniently ignores this point. (Petition at 13).

Petitioner's claim that the Fourth Circuit has somehow decided a novel question of law cannot survive scrutiny. Petitioner's primary complaint is that the *prima facie* framework followed by the Fourth Circuit does not protect an employee who "obeys under protest." (Petition at 8). However, the Fourth Circuit was not faced with this question. Petitioner herein was not subjected to an "either-or" employment directive which would have required her to obey or lose her job. By her own admission, she was given the opportunity to wear her full head covering by working in a different position. Had she alleged that this was a less desirable position which could have negative consequences on the terms and conditions of her employment, then Petitioner may have been faced with a proverbial "Hobson's choice." This, however, was never alleged.

This said, Petitioner makes the remarkable assertion that the decision of the Fourth Circuit is "flatly inconsistent" with this Court's decision in *Trans World Airlines v. Hardison*, 432 U.S. 63 (1976). In *Hardison*, an aggrieved airline employee brought suit against both his employer and his union by claiming that he was discriminated against on the basis of his

religion by being denied a requested schedule accommodation which would have permitted him to avoid working on Saturdays, his avowed Sabbath. Based on the underlying facts and circumstances, the Court ultimately held that TWA had, in fact, made reasonable efforts to accommodate in compliance with 42 U.S.C. 2000e(j), and that the airline was not required to ignore a collectively bargained seniority system as a means of accommodation. Petitioner boldly asserts that "Under *Hardison*, a Title VII violation occurs when an employer refuses to make the required accommodation, regardless of whether the victim defies or succumbs to the unlawful directive." (Petition at 13). The holding of *Hardison*, however, makes no such pronouncement. In fact, the Court was never faced with this issue, since Hardison (unlike Petitioner) held to his religious principles and was discharged for refusing to work his Saturday schedule. *Id.* at 64.

Following *Hardison*, the Court revisited the issue of reasonable accommodation under 42 U.S.C. 2000e(j) in *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986). In *Philbrook*, a high school teacher brought suit against the school board as a result of a collectively bargained policy prohibiting use of personal business days for religious observance. Unlike Petitioner, Philbrook maintained his religious convictions and took unauthorized leave during holy days of obligation, resulting in a tangible reduction in pay. Although the analysis and holding of *Philbrook* focused on the level and degree of an employer's duty to accommodate, it is notable that this Court declined an invitation to establish a new *prima facie* proof scheme for reasonable accommodation claims. *Id.* at 68. This is most likely due to the fact that the inclusion of the reasonable accommodation language contained in 42 U.S.C. §2000e(j), was not intended to alter the underlying protections of the statute, but rather "was added in 1972 to illuminate the meaning of religious discrimination under the statute." *Id.* at 63,

fn. 1. Instead of delineating a separate proof scheme for religious accommodation cases, the Court recited the framework for a prima facie case of religious discrimination followed by the Court of Appeals for the Second and Fifth Circuits, which requires an employee to show: "(1) he or she had a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting employment requirement." *Id.* at 65-66 *(quoting Philbrook v. Ansonia Board of Education*, 757 F.2d 476 (2nd Cir. 1985); *Turpen v. Missouri-Kansas-Texas R. Co.*, 736 F.2d 1022 (5th Cir. 1984)). That proof scheme is identical to that followed by the Fourth Circuit.

Petitioner's argument that there is somehow a split in the Circuits borders on frivolous. Nearly every Circuit to address the issue of a *prima facie* case of religious accommodation has applied the same elements referenced by this Court's decision in *Philbrook*, *supra*. In fact, the Circuit Courts have been mindful that this Court previously declined an invitation to establish a differing proof scheme for religious accommodation claims. The Third Circuit recently considered this issue in *Shelton v. University of Medicine & Dentistry*, 223 F.3d 220 (3rd Cir. 2000). Relying on the decision in *Philbrook*, *supra*, the Court recognized that this Court specifically declined to "establish for religious accommodation claims a proof scheme analogous to that developed in other Title VII contexts, delineating the plaintiff's prima facie case and shifting production burdens." *Id.* at 225 *(citations omitted)*. The Third Circuit concluded that it would continue to apply a *prima facie* test and burden-shifting approach which was "virtually identical" to that followed by the Second Circuit in *Philbrook v. Ansonia Board of Education*, 757 F.2d 476 (2nd Cir. 1985). *Id.* at 225.

The reasoning and formulation of the Second and Fifth Circuits (above) has been followed in all of the Circuits which have considered the issue.[5] Further, the *prima facie* framework in all Circuits is predicated on some form of adverse discipline, discharge, penalty, or failure to hire, depending upon the circumstance. *See Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1019 (4th Cir. 1996)(employee must show: "(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; and (3) he or she was disciplined for failing to comply with the conflicting employment requirement"); *Wilson v. U.S. West Communications*, 58 F.3d 1337, 1340 (8th Cir. 1995)(prima facie showing involves proof that "(1) the employee has a bona fide religious belief that conflicts with an employment requirement; (2) the employee informed the employer of this belief; (3) the employee was disciplined for failing to comply with the conflicting employment requirement"); *Beadle v. City of Tampa*, 42 F.3d 633, 636 (11th Cir. 1995)(prima facie case of religious discrimination requires: "(1)

---

[5] Although the District of Columbia Circuit and First Circuit have not yet definitively considered the issue, the district courts within these Circuits follow the same *prima facie* framework. *See EEOC v. Union Independiente De La Autoridad*, 30 F.Supp.2d 217, 220-221 (D.PR. 1998)(need to establish: "(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting employment requirement"); *Rasch v. National Railroad Passenger Corp.*, 1991 WL 221270, *4 (D.D.C. 1991)(plaintiff must establish "(1) that he subscribes to a bona fide religious belief that conflicts with an employment requirement, (2) that he informed the employer of this belief; and (3) that he was disciplined or discharged for failing to comply with the conflicting employment requirement").

that he had a bona fide belief that compliance with an employment requirement would be contrary to his religious belief or practice; (2) that he informed his employer about the conflict; and (3) that he was discharged or penalized for failing to comply with the conflicting employment requirement"); *Wright v. Runyon*, 2 F.3d 214, 216 fn. 4 (7th Cir. 1993)(employee must establish " (1) a bona fide religious practice conflicts with an employment requirement, (2) he brought this practice to his employer's attention, and (3) the religious practice was the basis for his discharge"); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1486 (10th Cir. 1989)(employee must prove: " (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was [not hired] for failure to comply with the conflicting employment requirement"); *Smith v. Pyro Mining Company*, 827 F.2d 1081, 1085 (6th Cir. 1987)(employee must show: " (1) he holds a sincere religious belief that conflicts with an employment requirement; (2) he has informed the employer about the conflicts; and (3) he was discharged or disciplined for failing to comply with the conflicting employment requirement"); *Protos v. Volkswagon of America, Inc.*, 797 F.2d 129, 133 (3rd Cir. 1986)(plaintiff must prove: "(1) that he subscribes to a bona fide religious belief that conflicts with an employment requirement, (2) that he informed the employer of this belief; and (3) that he was disciplined or discharged for failing to comply with the conflicting employment requirement); *Proctor v. Consolidated Freightways Corp.*, 795 F.2d 1472, 1475 (9th Cir. 1986)("to establish a *prima facie* case of religious discrimination under §§2000e(a)(1) and (j), the plaintiff has the burden of pleading and proving that (1) she had a bona fide religious belief; (2) she informed her employer of her religious views and that they were in conflict with her responsibilities as an employee; and (3) she was discharged because of her observance of that belief").

The cases cited by Petitioner as evidence of a split in the Circuits clearly miss the mark. Specifically, Petitioner cites *Cooper v. General Dynamics*, 533 F.2d 163 (5th Cir. 1976) and *Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998), *cert. denied*, 525 U.S. 1144 (1999) for the proposition that an adverse employment action is not required to bring a reasonable accommodation claim. None of these decisions, however, stand for this proposition for the simple fact that the courts never reached the issue. Petitioner also relies upon a trio of cases from the Ninth Circuit in *Hudson v. Western Airlines, Inc.*, 851 F.2d 261 (9th Cir. 1988), *EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988); and *American Postal Worker's Union v. Postmaster General*, 781 F.2d 772 (9th Cir. 1986). Petitioner's reliance on these decisions is misplaced. First, in *American Postal Worker's Union v. Postmaster General*, 781 F.2d 772 (9th Cir. 1986), the Court of Appeals never considered the issue because the Postal Service had conceded a prima facie case and chose to focus on the question of reasonable accommodation. *Id.* at 775. Next, in both *Hudson v. Western Airlines, Inc.*, 851 F.2d 261 (9th Cir. 1988), and *EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988), the plaintiffs (unlike Petitioner) had demonstrable adverse employment actions in the form of termination and constructive discharge, respectively. Moreover, as noted above, the Ninth Circuit's formulation of a *prima facie* religious accommodation case essentially mirrors *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir. 1996). The only difference between the two formulations is that in the Fourth Circuit, Petitioner was required to plead and prove that "she was *disciplined* for failure to comply with the conflicting employment requirement" (emphasis supplied). *Chalmers*, 101 F.3d at 1019. In the Ninth Circuit, Petitioner would be required to plead and prove that she "was *penalized* in some way because of the conflict" (emphasis supplied). *Townley*, 859 F.2d at 614 n. 5. This is a distinction without a difference, given the admissions made by

Petitioner in the instant case.

Even if Petitioner could show a "semantic" difference between the approach taken in one or more of the Circuits, the redress which Petitioner ultimately seeks is simply not within the purview of Title VII. From a policy standpoint, Petitioner is seeking a result which would represent a sea change in the longstanding remedial goals of Title VII. Petitioner does not seek redress for actual and identifiable harm related to the terms and conditions of her employment, but rather for alleged harm to her faith. This, however, is antithetical to the very purpose of the anti-discrimination statutes. As noted by this Court in *Philbrook*,

> "Title VII's central provisions make it an unlawful employment practice for an employer 'to fail or refuse to hire or to discharge, or otherwise to discriminate against any individual *with respect to his compensation, terms, conditions, or privileges of employment*... or 'to limit, segregate, or classify his employees ... in any way which would deprive or tend to *deprive any individual of employment opportunities or otherwise adversely affect his status as an employee*...."

Philbrook, 479 U.S. at 63, fn. 1. (emphasis added).

More importantly, the framework for protection of an employee's religious beliefs is predicated on the fact that the employee holds a "sincere" or "bona fide" religious belief. The approach advocated by Petitioner would effectively ignore this requirement and allow an individual who neither stuck to her religious beliefs nor suffered employment consequences of any kind, to nonetheless seek redress. Petitioner seeks to create an entirely new standard which would allow an employee to bring

suit on a theory that the employee was "coerced" into "violating his or her own religious beliefs," without an employment consequence. (Petition at 9).

As additional support for her arguments, Petitioner makes the analogy that sexual harassment law permits an employee who has suffered no economic detriment to nonetheless seek redress under Title VII. Petitioner points to this Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), and argues that an economic detriment is not a necessary prerequisite to Title VII liability. This is simply not analogous, and is, again, wide of the mark. First, the underlying lesson of *Meritor* was that acts creating a hostile work environment or *quid pro quo* sexual harassment can affect the terms and conditions of one's employment. This point is made clear by this Court's decision just last term in *Clark County School District v. Breeden*, 121 S.Ct. 1508 (2001), where this Court reiterated that actionable sexual harassment requires harm to the terms or conditions of an individual's *employment.* This Court noted:

> "Title VII forbids actions taken on the basis of sex that 'discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment.' 42 U.S.C. §2000e-2(a)(1). Just three Terms ago, we reiterated, what was plain from our previous decisions, that sexual harassment is actionable under Title VII only if it is "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 786, 118 S.Ct. 2275, 141 L.Ed. 2d 662 (1998)(quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399, 91

> L.Ed.2d. 49 (1986)(some internal quotation marks omitted)). See also *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 752, 118 S.Ct. 2257, 141 L.Ed.2d. 633 (1998)(Only harassing conduct that is "severe or pervasive" can produce a "constructive alteratio[n] in the terms or conditions of employment"); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (Title VII "forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment")."

Id. at 1509-1510.

In this case, Petitioner not only fails to allege that the terms and conditions of her employment were affected, but concedes that the terms and conditions were not altered. This is fatal. The laws of sexual harassment do not support Petitioner's arguments and her attempt to cite them are misplaced.

In all, given the facts as pled, the concessions made by Petitioner, and the current state of the law, the Fourth Circuit was justified in analogizing the *prima facie* framework for religion as requiring the establishment of an adverse employment action. This Court should disregard Petitioner's attempt to manufacture a split in the Circuits where none exists, and deny the Petition.

IV. THIS CASE HAS NO FAR-REACHING IMPLICATIONS.

In her summation, Petitioner invokes the specter of our country's Judeo-Christian heritage and argues that the Fourth Circuit's ***unpublished*** decision has "largely nullified" the "protections against discrimination on the basis of religion."

(Petition at 13). Petitioner concludes that the effect of the ruling is to increase the risk of intolerance by supervisors of "European ancestry" against the religious beliefs and practices of Muslims, Buddhists, Siks and countless other denominations. (Petition at 13-14).

Suffice it to say that Petitioner has greatly overstated the significance of both her case and the Fourth Circuit's ruling. Throughout this litigation, Petitioner has admitted that she suffered no detriment or "affect" to the terms and conditions of her employment. Petitioner nonetheless seeks to turn the remedial purpose of Title VII on its head, by asking this Court to permit an individual who claims a subjective harm unrelated to the terms and conditions of her employment to nonetheless sue her employer for employment discrimination. The federal court system is already confronted with the sizeable task of adjudicating innumerable civil rights cases involving actual and identifiable harm. The system would be ill-prepared to additionally handle lawsuits asserting perceived harm unrelated to the terms and conditions of one's employment.

Next, given the many procedural defects which haunt this case, there is little chance that the employment bar will perceive the Fourth Circuit's unpublished ruling as a significant change to existing law governing religious discrimination claims, but rather as an example of faulty pleading practice. This case raises no significant issue of religious discrimination which warrants this Court's review.

CONCLUSION

Because the Petitioner presents a question that was neither raised below nor supported by the factual record, the basis for this Petition is lacking. Because the procedural posture of the underlying claim was compromised by Petitioner's representations to the district court and her subsequent refusal to amend her complaint a second time, this case is a poor candidate for review. For these and all reasons stated herein, Petitioner's request for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ZEINAB ALI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. #99-1025-A
	)	
ALAMO RENT-A-CAR, INC.,	)	
	)	
Defendant.	)	

AMENDED COMPLAINT

Preliminary and Jurisdictional Statement

1. This is a lawsuit for religious discrimination in employment, brought by a Muslim woman who was refused permission to wear a religiously-mandated head scarf at work. The case arises under 42 U.S.C. §§1981a and 2000e-2. The court has jurisdiction under 42 U.S.C. §2000e-5(f)(3).

Parties

2. Plaintiff Zeinab Ali is a former employee of Alamo Rent-A-Car, Inc. She is Muslim.

3. Defendant Alamo Rent-A-Car, Inc. ("Alamo") is a corporation in the car rental business.

Claim for Relief

4. In December, 1996, Ms. Ali was working as administrative supervisor of Alamo's National Airport rental facility in Arlington, Virginia, having commenced her employment with the company a half a year earlier.

5. In accordance with her religion's practices and precepts regarding female modesty, Ms. Ali habitually wears a head scarf when in the presence of men. This was the case at all times relevant hereto.

6. While at work at Alamo, Ms. Ali wore a head scarf together with her company uniform. Ms. Ali's wearing of her scarf in no way interfered with her proper discharge of her duties as an Alamo employee or otherwise redounded to the detriment of the company.

7. In early December, 1996, Alamo replaced the former D.C. facilities director who had hired Ms. Ali with one H. Scott Cooper. Thenceforth, Ms. Ali reported to and worked across the hall from Mr. Cooper.

8. Shortly following the arrival of Mr. Cooper, the holy month of Ramadan began. During this month, as in former and subsequent years, Ms. Ali kept her head covered at all times.

9. On or about December 26, 1996, long after his arrival, Mr. Cooper told Ms. Ali that it was best for her not to wear her head scarf at work, as it was not part of her uniform and made her look different from the other company employees. Ms. Ali explained that she had to wear it, particularly since the month of Ramadan was in progress, during which Muslims experienced a heightened awareness of the religious obligations. Mr. Cooper advised Ms. Ali that if she persisted in wearing her head scarf he would place her in a position which she would not come frequently into contact with customers. He told her "to think about it" over the weekend.

10. When, the following Monday, Ms. Ali reported to work wearing her head scarf, Mr. Cooper told her "I see you have made your decision." Fearing the loss of her job, which she needed, Ms. Ali acquiesced reluctantly, after a fashion, in Mr. Cooper's demand. Unable, as a matter of principal, to acquiesce fully in the demand that she uncover her head, she replaced her usual head scarf, mandated for wearing during Ramadan, with a smaller head covering. She wore this covering until leaving her employment with Alamo.

11. Ms. Ali's acquiescence in Mr. Cooper's demand was in derogation of her religious obligations as she understood them. This conflict was at its most severe during the month of Ramadan, during which she was required to manifest more, not less, piety and modesty. The conflict continued for the period of her employment thereafter as well.

12. Mr. Cooper's prohibition, on behalf of Alamo, of Ms. Ali's wearing her head scarf was intentional, willful, in known violation of Ms. Ali's rights, outrageous and motivated by anti-Muslim sentiment or by callous indifference to Ms. Ali's sensibilities as a Muslim.

13. Ms. Ali complained of Mr. Cooper's prohibition to him and to his superiors at Alamo, whereupon she suffered numerous adverse employment actions appearing to be in the nature of reprisals.[1]

14. Ms. Ali filed a timely charge of discrimination with the Arlington County Human Rights Commission and the Equal Employment Opportunity Commission. This lawsuit is being filed within ninety days of her receipt of a right-to-sue letter from the EEOC. Ms. Ali has exhausted her administrative remedies.

15. By the actions of its employee and agent Mr. Cooper set forth above, Alamo discriminated against Ms. Ali by unreasonably refusing to accommodate her religious beliefs, in violation of 42 U.S.C. §2000e.

Wherefore, Ms. Ali requests an order of the court awarding her:

- - a declaration under 28 U.S.C. §2201 that by its actions Alamo violated Ms. Ali's right to employment free from religious discrimination,

---

[1]Discovery filed together with the complaint is intended to establish whether a sufficient basis exists, given Fed.R.Civ.P. 11, for Ms. Ali to allege discrete claims of retaliation in addition to the discrimination claim set forth in this complaint. This allegation and this footnote are intended to give Alamo notice of the plaintiff's potential legal claims in this regard, so that it may take such discovery of same as it sees fit. If discovery reveals no basis for so amending the complaint, Ms. Ali will stipulate to striking this paragraph of her complaint should defendant so request.

- - an award of actual damages and punitive damages against Alamo appropriate to the proof at trial,

- - an award of her costs, including reasonable attorney's fees, and

- - such other relief as is just.

Request for Jury Trial

Ms. Ali requests trial by jury.

Respectfully submitted,

ZEINAB ALI,

By counsel

Dated: October 4, 1999
Counsel for Plaintiff

/s/_____
Victor M. Glasberg, #16184
Victor M. Glasberg & Associates
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APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ZEINAB ALI, Plaintiff,	•	C.A. #99-1025-A
v.	•	Alexandria, Virginia December 3, 1999
ALAMO RENT-A-CAR, INC., Defendant.	•	10:00 a.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

THE COURT: Good morning. All right, we have before us the defendant's motion to dismiss, and I have looked at it with some care. Ms. Baldrate, this is your case, and I want to hear from you a little bit on this. My understanding is that your position is you've basically in your papers, I think, conceded that there was no adverse employment action taken by the defendant against your client. Do I read your papers correctly?

MS. BALDRATE: For purposes of this motion, we would concede that we have yet to receive discovery. We are -

THE COURT: But you know, I mean, rule 11 requires that you have a good foundation for believing that all the elements of your claims are met. It is clearly in the Fourth Circuit an element of this kind of a claim that there be an adverse employment action; don't you agree?

MS. BALDRATE: I'm not so sure. All of the cases cited to you by defendant were summary judgment cases once we were - -

THE COURT: That doesn't make any difference as to the elements. I'm not aware of the Fourth Circuit going - - in fact, the Fourth Circuit has a fairly stringent approach to what is considered an adverse employment action.

MS. BALDRATE: It does, although religion is different in Title VII, different from race and gender in that there is an affirmative duty to accommodate on the part of an employer which does not - - is not true for face and gender and other types of Title VII actions, so this is a somewhat different case for that reason.

The other reason it's different is that she - - instead of taking whatever punishment she would have received, she did receive some punishment, but instead of taking - - she took the hit on the religious side, and our position is that Title VII prohibits discrimination on the basis of religion in employment, and she was discriminated against on the basis of her religion.

THE COURT: Well, what - - my understanding these days, too, and, of course, it didn't grow out of a religion issue,

but that in employment discrimination cases in general, the Supreme Court is now requiring that an employee make a reasonable effort to go up through the grievance procedure or the chain of command so that the employer has an opportunity to address the alleged wrongs.

Now at least as your case is pled - - and I'm not so convinced now that that doesn't need to be pled in order to survive a motion to dismiss.

MS. BALDRATE: I'm sorry, to plead that she actually went up the chain of command?

THE COURT: Or did something. But there is - - do you now, did your client make any complaint to, was it Cooper or whoever this man was, his manager?

MS. BALDRATE: Yes, she did. She complained to a number of people, and she did go up the chain of command and was told that people would get back to her, and nothing ever happened. So it was, you know, over a number of months, she made oral complaints and written complaints. We didn't plead it, but that would come forward once the case moved forward. That would come out.

THE COURT: How many - - because it's such a bare bones complaint, we can't even get a feel for some of these issues, but from the time that he told her not to wear the headdress and then she went back to work, as I understand it, with the smaller head covering, how much longer did she continue to work at Alamo?

MS. BALDRATE: It was a number of months. She went back after he said to think about it over the weekend with

a regular head covering and was, as he threatened, was put in a position where she could not be seen by the customers.

THE COURT: I'm sorry, you said he put her in that position?

MS. BALDRATE: She was transferred to a different location within the facility, where she wouldn't be seen by the customers, and so I'm not sure of the exact day when she decided to change to the smaller head covering in an attempt to get back to her position out front, where she had been working, so it's, caution, we didn't plead what we considered to be adverse employment actions, because we weren't sure whether she was just subjectively perceiving them as adverse or if she would have been sent to this other location at some point anyway.

So we were waiting on discovery for that. We had not resolved our discovery disputes, so - -

THE COURT: I'm not sure - -

MS. BALDRATE: - - we just pled cautiously rather than jumping forward.

THE COURT: Well, I'm not sure how it's done. You're supposed to know - - it's your client. You're supposed to have talked to your client and have a decent idea of what happened before you bring a lawsuit in federal court.

[Transcript at pages 2-5]

* * * * *

THE COURT: All right. Well, what I'm doing is this complaint is not sufficient in my view. It is a legally insufficient complaint. It has not adequately alleged what I believe you have to allege in the Fourth Circuit is that an actual adverse action was taken.

I'm going to dismiss the complaint without prejudice and give you 11 days in which to refile, but I think under rule 11, you have got to conduct -- and I would hope, Ms. Khan, you might -- it's to your client's benefit to talk with counsel, give them what information they need. It sounds to me based on what I've heard this morning is that you do not have sufficient evidence of any genuine adverse employment action.

In the Fourth Circuit, simply changing a person's job assignment, unless it has a negative impact on their career development or changes in the condition of their salary, it has to be a significant, not a minor, change in the terms and conditions of employment, even if it was related to an impermissible motive, in order for it to amount to a cognizable Title VII lawsuit.

So you have leave to refile the complaint within 11 days if you can do so within the strictures of rule 11.

And, Ms. Khan, you will cooperate in giving them [supplemental discovery]- -

MS. KHAN: Yes, Your Honor. I will.

THE COURT: All right, that's fine. Thank you very much.

MS. KHAN: Thank you, your honor.

MR. GLASBERG: Your Honor, may I address the Court for a moment? I don't propose to argue anything.

THE COURT: All right, Mr. Glasberg.

MR. GLASBERG: I may have put Ms. Baldrate at a disadvantage in arguing this case on which I wrote the complaint before she came to my firm. We will file the amended complaint, and we will revisit the entire issues set before the court. The frailty that you see in the complaint is in accordance with –

THE COURT: Look, notice pleading is wonderful, but it has to have enough meat on it to survive a motion to dismiss.

MR. GLASBERG: Judge, I can't answer that without rearguing the issue that you have decided, and I don't wish to do that.

THE COURT: All right.

MR. GLASBERG: I take your point.

THE COURT: – and I've put you on notice, but I'm telling you that this case better have a bit more to it than what it appears to be to it as I look at is, and, of course, in that 11-day time period, there's also the opportunity to resolve the matter informally....

MR. GLASBERG: I'll do that, Judge, and maybe if Ms. Baldrate has a hand in writing the complaint, it will be better than the one I wrote. Thank you.

[Transcript at pages 11-13]

MOTION FILED
JUL 20 2001

(3)

No. 00-1813

IN THE
Supreme Court of the United States

ZEINAB ALI,
Petitioner,

v.

ALAMO RENT-A-CAR, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, COUNCIL ON AMERICAN-ISLAMIC RELATIONS, ARAB AMERICAN INSTITUTE, AMERICAN MUSLIM COUNCIL, AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The American-Arab Anti-Discrimination Committee (ADC), the Council on American-Islamic Relations (CAIR), the Arab American Institute (AAI), the American Muslim Council (AMC) and the National Employment Lawyers Association (NELA) move for leave to file the accompanying brief *amici curiae* in support of the position of petitioner Zeinab Ali, who has petitioned the Court for a writ of certiorari from the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Pursuant to Supreme Court Rule 37.3, *amici's* counsel has sought the parties' consent to the filing of the within brief. Specifically, counsel for the Respondent was contacted by telephone and by letter of July 5, 2001. Subsequently, Respondent's counsel notified the undersigned that consent would be withheld. Counsel for the Petitioner has consented.

REASONS FOR GRANTING THE MOTION

Amici believe that the ruling below raises extremely important issues regarding the practical effect of Title VII's prohibition of religious discrimination in the American workplace. *Amici* share Petitioner's view that the decision below, together with decisions from a handful of additional circuits, conflict with the view of the majority of the circuits with respect to the elements of a *prima facie* case of religious discrimination under Title VII. *Amici* believe that this is a critically important conflict that needs to be resolved by this Court. In short, and as more fully set forth in the accompanying Brief, if the ruling below stands, religiously observant members of certain religions—especially those in minority faiths—will be subject to coerced choices between their jobs and their religious practices. *Amici* believe this to be contrary to the language and intent of Title VII's proscriptions against religious discrimination.

Amici ADC, CAIR, AAI and AMC are American advocacy organizations representing the interests of Arabs and Muslims in this country. As such they are acutely aware of the discrimination experienced by Arabs and Muslims, in the workplace and elsewhere, and together with NELA, are well positioned to assist the Court and the parties by providing additional information and perspective on the importance of this case.

Accordingly ADC, CAIR, AAI, AMC and NELA request that the Court allow the filing of their brief *amici curiae*.

Respectfully submitted,

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QUESTION PRESENTED

Whether an employer's knowing and explicit requirement that an employee abandon or compromise one of her religious principles while at work is sufficient to invoke the protections of Title VII, where there is no effort at accommodation and where observance of the principle in question has no impact on the employee's performance of her responsibilities.

PARTIES

The parties to this action are set forth in the caption.

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OPINIONS BELOW

The opinion of the court of appeals, dated March 6, 2001, and the Memorandum Opinion of the district court, dated December 7, 1999, are set out in the Appendix to the Petition for Writ of Certiorari at pp. 1a-8a and 9a-12a respectively.

JURISDICTION

The decision of the court of appeals was entered on March 6, 2001. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTES INVOLVED

Section 2000e-2(a)(1) of 42 U.S.C. provides in pertinent part:

> It shall be an unlawful employment practice for an employer—(1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . religion. . . .

Section 2000e(j) of 42 U.S.C. provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

INTEREST OF *AMICI CURIAE* [1]

The American-Arab Anti-Discrimination Committee (ADC) is a non-sectarian, non-partisan grassroots advocacy organization that was founded in 1980 to defend the civil

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[1] No part of the attached brief has been authored by counsel for either party or any other entity. In accordance with Supreme Court Rule 37.6, *amici* state that no persons other than the *amici* curiae, its members or its counsel made a monetary contribution to the preparation and submission of this brief.

rights of people of Arab descent and to promote their rich ethnic heritage. Based in Washington, D.C., ADC has a national membership of 30,000 Arab Americans lodged in more than eighty chapters nationwide. ADC has regional offices in Detroit, Michigan and Los Angeles, California.

ADC's interest in this case stems from its concern that large numbers of its Arab and Muslim members regularly experience discrimination generally in their daily lives and particularly in the workplace. In response to the White House "Initiative on Race," instituted under the administration of President Clinton, ADC prepared a 1996-97 Report on Hate Crimes and Discrimination against Arab Americans.[2] That Report concluded that "[h]ate crimes, discrimination and defamation of Arab Americans are widespread and permeate the workplace, the service industry, the media, the schools, and federal agencies." Continued investigation by ADC finds that these trends are continuing. Symptomatic is the constant stream of hostile and racist anti-Arab hate mail received by ADC. For example, during the last two months of 2000, ADC received one hundred eighty six separate pieces of hate mail, two hundred fifty hate messages transmitted electronically, and numerous threatening telephone calls.

ADC receives approximately 1,500 complaints of employment discrimination annually from its Arab and Muslim members. Of particular significance for this case, the number of discrimination complaints that ADC has received from Muslim women who wear the *hijab*, or head cover, has increased significantly. Muslim women who wear the *hijab* in the workplace are frequently harassed by co-workers and are often asked by employers to remove their head covering or risk termination or transfer. ADC has long believed that such actions by employers violate Title VII of the Civil Rights Act of 1964.

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[2] 1996-97 Report on Hate Crimes & Discrimination Against Arab Americans, 1997 ADC Research Institute.

The Council on American-Islamic Relations (CAIR) is a non-profit, grassroots organization dedicated to defending the religious rights of Muslims in America and to presenting an Islamic perspective on issues of importance to the American public. As part of its mission, CAIR has attempted to resolve thousands of employment discrimination cases dealing with religious accommodations of Muslims. A large portion of those cases dealt directly with Muslim women who suffered as a result of their employers failing to allow them to wear their religiously mandated headscarf or *hijab*. This is a matter of great concern to CAIR and its constituents. Ms. Ali's case exemplifies the problems that these women face when trying to adhere to their religious beliefs.

The Arab American Institute (AAI) is a non-partisan, non-sectarian organization dedicated to the political empowerment of Americans of Arab descent. AAI works to facilitate Arab American participation in national, state and local politics and government, and provides a forum for the development of policy positions on domestic and foreign policy matters of concern to Arab Americans. Since its founding in 1985, AAI has played an active role in issues of racial profiling, hate crimes and discrimination, generally and as they particularly effect Arab-Americans. AAI's members regularly report instances of discrimination at their places of work, and AAI has worked to address these problems as well. Its concern in this case stems principally from this latter experience.

The American Muslim Council (AMC) is a non-profit organization established in 1990 to increase the effective participation of American Muslims in this country's political and public policy arenas. AMC seeks to encourage and facilitate the active participation of American Muslims in the American political process in order to increase their voice in the formulation of domestic and foreign policy. AMC also conducts education and lobbying on issues of concern to American Muslims, and works to develop local and

regional Muslim activist networks to defend the legal rights of Muslims.

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 3,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes. NELA publishes a quarterly journal containing articles and reports of interest to its members and offers wide-ranging continuing legal education programs, including a three-day annual conference and several two-day workshops annually. As part of its advocacy efforts, NELA has filed numerous *amicus curiae* briefs before this Court, singly or jointly with other *amici*. Some recent cases include *Kolstad v. American Dental Association*, 527 U.S. 526 (1999); *Faragher v. City of Boca Raton*, 524 U.S. 775(1998); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); and *Pollard v. E.I. Dupont De Nemours Company*, ___ U.S. ___, 121 S.Ct. 1946 (2001).

Amici believe that the ruling below raises extremely important issues relating to the practical effect of Title VII's prohibition of religious discrimination in the American workplace. If the ruling is not reviewed and corrected by this Court, religiously observant members of certain religions—especially those in minority faiths—will all too frequently be forced to choose between their jobs and their religious practices. This is no small matter, if for no other reason than that the numbers of such individuals comprise a rapidly growing portion of the American workforce.

In brief, *amici* submit that an employer's unadorned direction that an employee abandon or compromise an innocuous, private religious practice or observance is sufficient to invoke the protection of Title VII. Yet under the reasoning that prevails in the Fourth and a few other circuits, employees whose religious beliefs bring them into conflict with the requirements or practices of their employer will be

denied access to the conciliation and other remedial provisions of Title VII, unless the conflict escalates to the point where termination or other severe economic penalty is imposed or explicitly threatened. This reasoning permits, and arguably encourages, an employer to impose a choice between an employee's observance of a private religious duty and his or her economic security, even if, as here, the observance has no impact on the employer's operations. This is precisely what the religious discrimination provisions of Title VII, as amended in 1972, were enacted to prevent. It is of little comfort that the employee faced with this draconian choice may force the issue and sue if she is fired. For, as this Court has recognized and common sense underscores, "the victims of job discrimination want jobs, not lawsuits." *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 230 (1982).

STATEMENT OF THE CASE [3]

Zeinab Ali, a Muslim woman, worked as an administrative supervisor for Alamo Rent-A-Car, Inc. at its facility at Reagan National Airport in Arlington, Virginia. Her religion requires her to wear a headscarf (*hijab*) in public, particularly in the presence of men, and she observed this requirement while at work. However, in December of 1996, a new supervisor, H. Scott Cooper, told Ms. Ali that she should not wear her headscarf at work because it "made her look different from the other company employees," and because it was not part of her uniform. Mr. Cooper issued this directive during the Muslim holy period, Ramadan, a period when a Muslim's awareness of his or her religious obligations is accentuated.

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[3] The case was decided below on the basis of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Accordingly, except where otherwise indicated the facts here set forth are taken from Ms. Ali's Amended Complaint.

Ms. Ali protested that her religion required her to wear the scarf—especially during Ramadan. However, Mr. Cooper told her that if she persisted he would move her to a position where she did not come into contact with customers. He advised her to "think about it" over the weekend. When she returned to work wearing the scarf, Mr. Cooper told her "I see you have made your decision." She was then moved to a position involving no customer contact.[4] Thereafter, fearful for her job, Ms. Ali altered her behavior to meet Mr. Cooper's demands. She stopped wearing the headscarf mandated by her religion—though she replaced it with "a smaller head covering." She continued wearing the smaller headscarf until leaving the employ of Alamo as a result of a layoff.

After her departure from Alamo, Ms. Ali sued, contending that Mr. Cooper's directive requiring her to dispense with the headscarf mandated by her Muslim religion violated Title VII's strictures against discrimination based on religion. She alleged that Cooper's actions were "motivated by anti-Muslim sentiment or by callous indifference to [her] sensibilities as a Muslim." Ms. Ali's Complaint sought, *inter alia*, "a declaration under 28 U.S.C. §2201, that by their actions defendants violated her right to employment free from religious discrimination."

Alamo moved to dismiss the Complaint on the ground that Ms. Ali had neither alleged nor suffered an "adverse action." The district court, observing that "the Fourth Circuit has a fairly stringent approach to what is considered an adverse employment action," agreed with Alamo and entered an order dismissing the Complaint. The court found that Ms. Ali failed to state a claim for relief because she alleged neither

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[4] The fact that Ms. Ali was transferred to a position that kept her out of the view of Alamo's customers was not actually alleged in the Amended Complaint. However, it was stated as a fact by counsel during proceedings before the District Court. *See* Jt. App. pp. 18-19. It was assumed to be the case by the Fourth Circuit in its recitation of the facts. Pet. 3a.

"an actual or threatened adverse employment action."[5] Pet. 11a. Ms. Ali's allegation that she "was told she would be placed in a position with less customer contact or visibility if she did not remove her headscarf" was insufficient. According to the district court, there was no indication "that the threatened position would impact her ability to obtain a promotion or to get a raise," that it would affect duties, or that it would be otherwise "undesirable." *Id.*

The Court of Appeals affirmed in an unpublished opinion. It did not review its previous decisions addressing the necessity that an "adverse employment action" be established as part of a *prima facie* case under Title VII. Nor did it consider how that term might apply in the context of a religious discrimination claim. Rather, the Court proceeded on the assumption that Ms. Ali had conceded that she did not suffer an "adverse employment action." In this regard, *amici* believe that the Fourth Circuit's factual recitation is somewhat misleading. For while Ms. Ali did concede that she was not alleging a "work-related detriment," she also alleged that she had experienced palpable harm as a consequence of her employer's actions. As she put it in her brief to the Court of Appeals:

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[5] The district court relied on the Fourth Circuit's decisions in *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir. 1996) and *Boone v. Goldin*, 178 F. 3d 253 (4th Cir. 1999). In *Chalmers* the plaintiff had been fired because of conduct she claimed was prompted by her religious beliefs. This Court upheld the district court's grant of summary judgment "[b]ecause Chalmers provided Tulon with no notice of her need to engage in this conduct and because, in any event, this conduct was not susceptible to accommodation." In passing, the court described the requirements of Mrs. Chalmers' *prima facie* case as including a showing that "she was disciplined for failure to comply with the conflicting employment requirement." But this element fit the facts, and there was no need to consider whether the requirement would be applicable in different circumstances.

> While [Ms. Ali] suffered what a layperson would term retaliatory actions arising out of her confrontation with Mr. Cooper, as well as the affront of having her religious needs dismissed in cavalier fashion by the non-responsiveness of numerous company officials to whom she complained, she did not experience a formal demotion, loss of pay, or discretely cognizable adverse employment action. She took the "hit" on the religious side, not in an actionable manner on the work side. For this reason, Ms. Ali never attempted to state a conventional Title VII discrimination claim under this court's employment detriment standard set by *Page v. Bolger* and its progeny.

Brief for Appellant, p. 6. In any event, the Court of Appeals held that "Title VII religious discrimination claims [like claims based on race, gender, color or national origin] clearly require a showing of adverse employment action." Pet. 5a. Because the court found that Ms. Ali had not alleged such a showing, the judgment below was affirmed.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW WILL FOSTER RELIGIOUS DISCRIMINATION IN THE WORKPLACE AND IS DIRECTLY CONTRARY TO THE RELIGIOUS DISCRIMINATION PROVISIONS OF TITLE VII AND THIS COURT'S CONSTRUCTION OF THOSE PROVISIONS.

1. Freedom of religious expression is a fundamental hallmark of our democracy. Enshrined in the First Amendment, religious expression has been protected against governmental encroachment since the first days of the republic. In marked contrast to those early days, however, we are today a Nation of workers whose citizenry is enriched by a wide range of religious diversity. Many religions are cherished and observed in this country. Because of these

demographic trends, Title VII's imposition on employers of a limited obligation to accommodate religious diversity is of critical importance.

Adherents of religions outside the American religious mainstream are a rapidly growing component of the American workforce. According to *amici's* information, there are between seven and eight million Muslims in the United States. And a recent report prepared by the Economic and Social Council of the United Nations found that Islam is the country's fastest growing religion.[6] However, the assimilation into the workforce of these and other "eastern" religions is far from smooth. According to the U.N. Report, Muslims experience "islamophobia and racial intolerance in American society," fueled by a media and popular press that all too often portray Muslims as nothing more than dangerous extremists and terrorists.[7] Not surprisingly, this antipathy spills over into the workplace. This is borne out by the large number of complaints of employment discrimination received by several *amici*. *See* discussion, *supra* pp. 1-3. The U.N. Report stresses that Muslims frequently experience disrespect for their religious practices while at work, and that this disrespect is especially acute for "women wearing 'Islamic' dress (the *hijab*)."[8]

These phenomena are also reflected in data collected by the Equal Employment Opportunity Commission (EEOC). While claims of religious discrimination are a relatively small number of the claims filed with the EEOC, they have increased by well over forty *per cent* since 1992. Similarly, claims filed by Muslims have more than doubled during the

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[6] U.N. ESCOR, 55th Sess., U.N. Doc. E/CN.4/1999/58/Add.1, at para. 30(g).

[7] *Id.* at para. 36-37.

[8] *Id.* at para. 37(a).

same period. [9] *Amici* also note that the total number of EEOC complaints filed by Muslims in 2000, 284, is a small fraction of the complaints they receive each year from their constituents—indicating that much workplace discrimination experienced by Muslims is not addressed in the legal system.

In short, Ms. Ali's circumstances are far from unique. Muslim women are frequently required to dispense with their headscarves, and Muslims generally are all too frequently subjected to discrimination in the workplace. Muslims and adherents of Islam are a rapidly growing part of American society at large and the workforce as well. These factors make it important for this Court to ensure that Title VII's proscriptions against religious discrimination are applied fairly and evenly.

2. Title VII was amended in 1972 to broaden the proscription against discrimination on the ground of religion by adding an accommodation obligation. A new section 701(j) defined religion to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). This new provision was intended "to require employers to make reasonable accommodations for employees whose 'religion' may include observances, practices, and beliefs . . . which differ from the employer's . . . requirements regarding standards, schedules, or other business-related employment conditions." *See* 118 Congressional Record, pp. 1861-1862 (1972).

As expressed by the Court of Appeals for the Seventh Circuit, section 701(j) requires "an employer [to] reasonably accommodate an employee's religious observance or practice

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[9] These data were provided to *amici* by the Information Resource Management Division of the Equal Employment Opportunity Commission in Washington, D.C.

unless it can demonstrate that such accommodation would result in undue hardship to the employer's business." *See Rodriguez v. The City of Chicago*, 156 F.3d 771, 775 (7th Cir. 1998). Rodriguez, a police officer, balked at guarding a local abortion clinic because of his religious beliefs. Ordered to do so, he acceded, "under protest," and then filed suit. As in this case, there was no explicit threat of termination or other discipline, and the City moved to dismiss on this basis. The district court denied this motion, finding it "nonsensical" to contend that an employee "has not been the victim of religious discrimination" when he is "forced by his employer to choose between his job and his faith [and] elects to avoid potential financial and/or professional damage by acceding to his employer's religiously objectionable demands."[10] *See also E.E.O.C. v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 614 n. 5 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989) ("An employee does not cease to be discriminated against because [s]he temporarily gives up [her] religious practice and submits to the employment policy.").[11]

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[10] *Rodriguez v. The City of Chicago*, 1996 U.S.Dist. Lexis 533; 69 Fair Empl. Prac. Cas. (BNA) 993 (N.D. Ill.) The District Court ultimately granted the City's motion for summary judgment, ruling that it had met its obligation to reasonably accommodate Officer Rodriguez's religious beliefs. *Rodriguez v. The City of Chicago*, 975 F.Supp. 1055 (N.D. Ill. 1997). At this point, the City had conceded the establishment of a *prima facie* case. This decision was affirmed on appeal when the Court of Appeals upheld the trial court's conclusion that the City had reasonably accommodated Officer Rodriguez's religious practices. *Rodriguez v. The City of Chicago, supra.*

[11] In *Townley*, the employer refused to excuse an atheist from mandatory religious services. The employee resigned, ultimately claiming he had been constructively discharged. The Court of Appeals found it unnecessary to address the constructive discharge question, holding that the employer violated Title VII simply by refusing the employee any accommodation at all. *Cf., American Postal Workers Union v. Postmaster General*, 781 F.2d 772, 774-75 (9th Cir. 1986)(Postal employees who

As the decisions in *Rodriguez* and *Townley Eng'g* demonstrate, and as the Petitioner explains (Pet. pp. 10-14), there is a split in the circuits over the question decided below. Most circuits have not adopted the restrictive approach espoused by the Fourth Circuit.

This Court has twice considered the extent of the accommodation obligation under section 701(j). *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Ansonia Bd. Of Ed. v. Philbrook*, 479 U.S. 60 (1986). On both occasions, the Court made clear, as a threshold matter, that Congress intended to impose an accommodation obligation on an employer faced with an employee's conflicting religious observance or practice. Thus, in *Hardison*, the Court found that "the employer's statutory obligation [under section 701(j)] to make reasonable accommodation for the religious observances of its employees . . . is clear." The intent of Congress in enacting section 701(j) "was to *make it . . . unlawful* . . . for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." 432 U.S. at 74-75 (emphasis supplied). Nearly ten years later, in *Philbrook*, the Court reiterated that where an employee's religious beliefs conflict with an employer's practices, "*[t]he employer violates the statute* unless it 'demonstrates that [it] is unable to reasonably accommodate . . . an employee's . . . religious observance or practice without undue hardship . . . .'" 479 U.S. at 68 (emphasis supplied).

By its terms, then, section 701(j) establishes that an employer violates Title VII when it fails to accommodate an employee's "religious practices," unless it shows "undue

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agreed under protest to compromise their religious beliefs by processing draft registration forms established a prima facie case.).

hardship." [12] Ms. Ali was expressly and knowingly directed to violate one of her religious practices, a direction she alleges was "motivated by anti-Muslim sentiment or by callous indifference to [her] sensibilities as a Muslim." There was no offer to accommodate her. Ms. Ali acceded to her employer's directive out of fear for her job. These facts are more than sufficient to invoke the "statutory obligation [under § 701(j)] to make reasonable accommodation" for Ms. Ali's "religious observances." *Hardison*, *supra*, 432 U.S. at 74. The fact that Alamo did not discipline Ms. Ali, or otherwise take action having a direct economic effect on her work, does not rob her claim of viability under Title VII. In the absence of a proffered accommodation, or a showing that any accommodation would result in undue hardship, the employer's actions are simply "unlawful." *See Hardison* and *Philbrook*, both *supra*.

This is a critically important point, but hardly a radical one, either in terms of its application to these facts or as a reading of the statute. The wearing of her headscarf was an important religious observance for Ms. Ali. Her wish to honor it did not threaten her employer with any economic or logistical

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[12] The Equal Employment Opportunity Commission's regulations confirm that section 701(j) establishes a freestanding accommodation obligation:

> Reasonable accommodation without undue hardship as required by Section 701(j) of title VII of the Civil Rights Act of 1964.
>
> * * * *
>
> (b) Duty to accommodate; (1) Section 701(j) makes it an unlawful employment practice under section 703(a)(1) for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.

29 CFR §1605.2.

hardship. With or without her headscarf she remained perfectly able to perform her responsibilities. When this fact is faced, the threat to move her out of the sight of Alamo's customers because of the headscarf emerges as pure and simple religious discrimination.

This conclusion is compelled when religion is compared with other categories of discrimination proscribed by Title VII. One would hardly argue in this day and age, for example, that an employer could put his African American or female employees in the back room to avoid offending customers. To be sure, when the case proceeds, Alamo will be free to try to demonstrate that reassigning Ms. Ali out of its customers' view constituted a proper accommodation of her religious beliefs, or that it otherwise accommodated them. At the same time, Ms. Ali will be free to adduce evidence of the damages she sustained as a consequence of being forced to swallow this gross trivialization of her religious beliefs. What is clear to *amici*—and what we urge on this Court—is that the case should not have been snuffed out at this early juncture.

CONCLUSION

By allowing employers to force their employees to choose between their religious practices and observances and the economic security provided by a job, the ruling below sharply impedes the exercise of religious freedom in the American workplace in the Fourth Circuit and in the other circuits adopting similar reasoning. *Amici* submit that this result is plainly inconsistent with the religious discrimination provisions of Title VII. Because of the importance of this case, *amici* urge that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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July 20, 2001

MOTION FILED No. 01-1813 (4)

JUL 19 2001

IN THE

Supreme Court of the United States

ZEINAB ALI,

Petitioner,

—v.—

ALAMO RENT-A-CAR, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS, AMERICAN JEWISH COMMITTEE, AGUDATH ISRAEL OF AMERICA AND ANTI-DEFAMATION LEAGUE IN SUPPORT OF PETITIONER

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In the

Supreme Court of the United States

No. 01-1813

ZEINAB ALI,

Petitioner,

vs.

ALAMO RENT-A-CAR, INC.,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE AMERICAN JEWISH CONGRESS, AMERICAN JEWISH COMMITTEE, AGUDATH ISRAEL OF AMERICA AND THE ANTI-DEFAMATION LEAGUE IN SUPPORT OF PETITIONERS

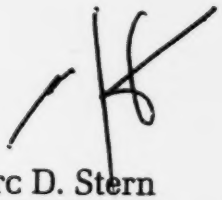
Proposed *amici*, American Jewish Congress, American Jewish Committee, Anti-Defamation League and Agudath Israel of America move this Court for an Order permitting the filing of the attached brief *amici curiae*.

Petitioner's counsel consented to the filing of this brief; Respondent's counsel did not respond to our inquiry.

Each *Amici* is an organization with a long record of involvement with religious accommodation under Title VII of the 1964 Civil Rights Act, representing individual clients, participating in litigation as *amicus*,

and in urging legislation designed to improve the effectiveness of the Act. They each believe that their collective experience may aid the Court in deciding this case.

Accordingly, the proposed *amici* respectively move for leave to file the attached brief.



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July 18, 2001

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INTEREST OF THE *AMICI*

The American Jewish Congress is an organization of American Jews dedicated to protecting the civil and religious rights of American Jews and all Americans. It has filed briefs *amici curiae* in cases involving the religious accommodation of employees.

***

The American Jewish Committee ("AJC"), a national organization of approximately 100,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews. It is the conviction of AJC that those rights will be secure only when the rights of all Americans are equally secure.

AJC's interest in this case stems from its belief that without a fair and generous reading of the protection against religious discrimination accorded under the Civil Rights Act of 1964, as amended, conscientiously observant employees may be forced to violate major tenets of their faith is order to secure or retain gainful employment.

***

The Anti-Defamation League ("ADL") was organized in 1913 to advance goodwill and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States.

ADL has consistently adhered to the principle that its goal of combating religious prejudice, as well as

the general stability of our democracy, are best served through the strict separation of church and state and the use of the Free Exercise Clause to guard zealously the rights of all to their fundamental religious beliefs and the exercise of those beliefs. ADL's mission has guided it to file *amicus* briefs in virtually every major church-state case to reach this Court.

***

Agudath Israel of America is a national Orthodox Jewish organization that advocates the rights and interests of observant Jews throughout the United States. Many of Agudath Israel's constituents are readily identifiable as Orthodox Jews through their distinctive religious garb and thus have a great personal stake in meaningful civil rights protection for religiously observant employees who are treated differently simply because they are dressed differently.

ARGUMENT[1]

Introduction

The Civil Rights Act of 1964 banished 'separate but equal' treatment of racial and religious minorities from the workplace. Nevertheless, the Fourth Circuit resurrected that discredited doctrine, reading it into the very statute designed to eradicate it. This Court should grant the Petition for Certiorari to decide whether the Court below thereby distorted beyond recognition this great statutory charter of equality.

The holding of the Court below boils down to the proposition that employees whose religious beliefs require the wearing of distinctive garb may be banished to the workplace equivalent of the back of the bus so long as the employee suffers no measurable economic loss. Moslem women who cover their hair with scarves, Orthodox Jewish males who cover their heads with skull caps, Sikhs who wear turbans, Pentecostalist women who refuse to wear pants, and men of various faiths who do not shave for religious reasons, may be relegated with impunity to workplace ghettoes, so long as the employer does not impose any economic penalty, or what the Court below termed an "adverse employment action".

---

1. No person or corporation other than the *amici* or their counsel participated in the drafting of this brief, nor did any person or corporation other than the *amici* contribute towards its cost.

Because the statute treats racial and religious discrimination[2] equally, employers in the Fourth Circuit may now relegate blacks to back offices, away from contact with customers, give them all the undesirable tasks and assignments in the workplace, and insist on separate but equal waters coolers and bathrooms.

To state the proposition that such palpably discriminatory and prejudiced treatment of employees does not offend an Act guaranteeing equal employment opportunity and banishing bias and bigotry from the workplace, is to refute it. If authority is needed, it is readily available. A leading treatise on employment discrimination law summarizes the law as follows:

> Segregated facilities played a prominent role in the history of racial discrimination. Such bastions of racial discrimination were among the first to be attacked and conquered.
>
> Segregation of physical facilities, such as lockers, water fountains, recreation areas, restrooms and other facilities at the place of employment, on the basis of race violates Title VII. If housing is provided by the employer, it constitutes a term and condition of employment and cannot be segregated. Segregated parties and social

---

2. Religious practice is within the scope of the ban on religious segregation contained in 42 U.S.C. § 2000e-2(a) by virtue of the definitional provisions of the statute, 42 U.S.C. § 2000e(j).

clubs violate Title VII if sponsored by the employer.

B.L. Schlei & P. Grossman, Employment Discrimination Law (2nd Edition, Chapter 9, § V, pp. 300-301) (1976).

These propositions are there, *id.* at nn. 33-36, and in later supplements, supported by a lengthy list of authorities, including both judicial decisions and decisions of the Equal Employment Opportunity Commission. In those decisions, dealing with non-economic attributes of employment such as locker rooms, bathrooms and water coolers, the Commission and the courts uniformly concluded that separate but equal facilities were illegal without regard to whether those segregative practices imposed what the Fourth Circuit, 2001 W.L. 218788, *1 (4th Cir. 2001), called an "adverse employment action," *i.e.*, an economic cost, such as a present or likely future loss of wages or benefits. The wrong identified in these early cases is segregation, not segregation leading to economic loss.

I. THIS COURT SHOULD RESOLVE THE CONFLICT OF THE CIRCUITS WHETHER ONLY ECONOMICALLY VALUABLE "TERMS, CONDITIONS OR PRIVILEGES OF EMPLOYMENT" ARE PROTECTED BY TITLE VII

The Fourth Circuit drew its "adverse employment action" requirement from the language of 42 U.S.C. § 2000e-2(a)(1). That subsection bans discrimination with respect to "compensation, terms, conditions or privileges

of employment" on grounds, *inter alia*, of race or religion.

The Fourth Circuit's economic-based reading of the phrase "terms, conditions or privileges" of employment is not unique. Accord, *Spears v. Missouri Dep't of Corrections and Human Resources*, 210 F.3d 850 (8th Cir. 2000). It is, however, not self evidently correct. Whether the "terms, conditions or privileges" are limited to economic "terms, conditions or privileges" is itself an important question meriting the Court's review both because of its intrinsic importance and because not all courts accept the narrow reading of the Fourth and Eighth Circuits. See *Sharp v. Houston*, 164 F.3d 923 (5th Cir. 1999) (transfer to less prestigious or interesting position actionable); *Jeffries v. State*, 147 F.3d 1220, 1232 (10th Cir. 1998); *Bryson v. Chicago State University*, 96 F.3d 912 (7th Cir. 1996) (loss of prestige); *McCabe v. Sharrett*, 12 F.3d 1558, 1564 (11th Cir. 1990) (menial responsibilities).

Amici believe the latter interpretation to be correct. Although people work largely for economic reasons, economic concerns do not encompass all of the factors that lead people to take one job over another. Economic reasons are not even necessarily foremost in people's minds–closeness to home, hours of employment, physical environment, risk of harm, type of work, ability to exploit one's talents, success on the job and contact with people, all are important

considerations for many workers, perhaps even more important than an increased salary.

Experts in human resources take note of these non-economic factors, which sometimes are sufficiently important that they either out-rank salary in importance or induce employees to accept less pay in order to exploit some non-economic job benefit.[3]

These are all factors arguably subsumed under the phrase "terms, conditions or (especially) privileges" of employment. Yet those courts which, like the Fourth and Eighth Circuits, insist on an economic detriment, allow these benefits be denied employees for reasons of racial, religious and gender bias. Some changes in working conditions may be too unimportant to effect the "terms, conditions, or privileges" of employment. *Cf. Carson County v. Breedon*, 121 S.Ct. 1508 (2001). However, it is an open question whether the Fourth Circuit correctly held that no non-economic interest could give rise to a Title VII claim.

II. SEGREGATING EMPLOYEES IS ILLEGAL WITHOUT REGARD TO ECONOMIC LOSS

The correctness of the Fourth Circuit's adverse employment action test is not the only important

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3. See, e.g., Y. Ting, Analysis of the Federal White-Collar Work Force: Findings From the Survey of Federal Employees, 26 *Rev. Public Admin.* 439 (1994); C. Caggiano, What Do Workers Want?, 14 *Inc.*, p. 101 (1992).

question presented by this Petition. The limiting phrase "compensation, terms, conditions or privileges of employment," the statutory basis of the Fourth Circuit's "adverse employment action" requirement, does not appear in Section 2000e-(a)(2), which flatly forbids an employer to "segregate ... his employees ... in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee ... because of such individual's religion." (Emphasis added.) That prohibition, which accurately describes Alamo's action in confining Ms. Ali to its back office operation, is not limited by the phrase "compensation, terms, conditions or privileges of employment." Hence it should apply even where there is no "adverse employment action."

Congress banned workplace segregation if it merely tended to adversely affect an individual employee. Thus, the explicit language of the text precludes a threshold requirement of actual economic harm, or an "adverse employment action," for Congress deliberately banned practices which only tended to adversely affect an individual employee. Creating a caste of employees who, like the proverbial crazy uncle, are kept out-of-sight, on grounds of race, religious garb or gender inevitably "tends" to adversely affect the advancement of the segregated employees. Moreover, segregation telegraphs to them, fellow employees and third parties that they are not employees the employer fully respects, values or trusts to do his business. Those

harmful tendencies are magnified where, as here, contact with the public is the essence of the employer's business.

Title VII's enactment was the culmination of a decade-long national struggle to implement this Court's landmark holding in *Brown v. Board of Education*, 344 U.S. 1 (1954), that separate was no longer unequal. Congress knew what it was doing in 1964 when it banned employers from perpetuating the isolation of separate but equal in the workplace without regard to economic loss.

Congress protected two distinct interests in Section 2000e-2, and established differing thresholds of harm appropriate to each. 42 U.S.C. § 2000e-2 (a)(1) arguably (although *amici* do not agree, Point I, *supra*) protects against economic losses attributable to employment discrimination. This section is limited to "terms, conditions or privileges" of employment. In contrast, 42 U.S.C. § 2000e-2 (a)(2), pointedly omits any economically-based language. It broadly protects against the harm to dignity interests inherent in workplace segregation.

Proof of a violation of Section 2000e-2(a)(1) might arguably be thought to require some proof of a tangible economic harm. Not so with regard to Section 2000e-2(a)(2)'s ban on segregated workplaces, protecting employees against affronts to their dignity. To protect that interest, which is not reducible to a dollars and

cents measurement, an economic threshold is wholly inappropriate.

If, as the Court below held, both branches of the statute require a showing of an "adverse employment action" measured only in economic terms, the two provisions are completely redundant. Everything prohibited by Section 2000e-2(a)(2) is already proscribed by Section 2000e-2(a)(1). Any segregative act with 'adverse employment consequences' would by definition affect the "terms, conditions or privileges of employment."

III. THE COURT NEED NOT ADDRESS POSSIBLE DEFENSES IN THIS PROCEEDING

The Court below rested its decision exclusively on the absence of an "adverse employment action." It had no occasion to consider whether the appropriate defense to Ali's charge of deliberate "segregation" is that of undue hardship, the usual defense to a failure to accommodate a religious practice, 42 U.S.C. § 2000e-2(j), or whether the more stringent BFOQ, 42 U.S.C. § 2000e-2(e) or business necessity test, 42 U.S.C. § 2000e-2(k), applies.

It may not matter. Presumably, a reasonable accommodation is a legal accommodation. A proffered accommodation which deliberately segregates workers on the basis of religion in violation of Section 2000e-2(a)(2) is illegal, and therefore not reasonable. *Cf. TWA v. Hardison*, 432 U.S. 63, 79 (1977) (contract forbidding

accommodation illegal). Moreover, because the evident undue hardship is that of a supposed customer preference for secularly dressed employees, the defense may fail in any event. Biased customer preference–even if it is more than Alamo projecting its own prejudices onto its customers–is not a sufficient defense to a charge of employment discrimination. *Diaz v. Pan American Airways*, 442 F.2d 385 (5th Cir. 1991). Resolution of these issues must await further proceedings.

CONCLUSION

The judgment of the Court below rests on an evident and pernicious misconstruction of the statute. This Court should grant the prayed for writ, and reverse the judgment.

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(5)

Supreme Court, U.S.
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No. 00-1813

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SUPREME COURT OF THE UNITED STATES

ZEINAB ALI,
Petitioner,

v.

ALAMO RENT-A-CAR, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

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ARGUMENT

(1) The parties appear to be in agreement as to the holding of the Fourth Circuit. Respondent correctly describes the controlling Fourth Circuit decision in *Chalmers v. Tulon Co. of Richmond*, 101 F. 3d 1012 (4th Cir. 1996), as requiring proof in a religious accommodation case that the employee "was disciplined for failing to comply with the conflicting employment requirement." (Br. Opp. 12). Under that standard the allegation that petitioner had been forced to abandon wearing her hijab at work was insufficient as a matter of law; "[a]bsent some form of discipline or negative consequence, Petitioner could not establish a *prima facie* case necessary to trigger the burden-shifting obligations of accommodation." (Br. Opp. 9).

Respondent firmly defends the holding of the Fourth Circuit:

> Petitioner does not seek redress for actual and identifiable harm related to the terms and conditions of her employment, but rather for alleged harm to her faith. This, however, is antithetical to the very purpose of the anti-discrimination statutes.

(Br. Opp. 15). Indeed, respondent suggests that any purportedly religious worker who violated her professed religious obligations merely because ordered to do so by her employer probably was not sincere in the first place.

> [T]he framework for protection of an employee's religious beliefs is predicated on the fact that the employee holds a "sincere" or "bona fide" religious

> belief. The approach advocated by Petitioner would effectively ignore this requirement and allow an individual who neither stuck to her religious beliefs nor suffered employment consequences of any kind, to nonetheless seek redress.

(Br. Opp. 15). In any event, respondent urges, the federal courts are simply too busy to entertain claims by religious employees who failed to defy their employers and incur disciplinary action. (Br. Opp. 18).

The fact that the court of appeals opinion in this case is unpublished does not render certiorari inappropriate. This Court routinely grants certiorari to review unpublished opinions.[1] The underlying Fourth Circuit precedent in *Chalmers* is both published and binding precedent in that circuit.

(2) The inter-circuit conflict on this issue is inescapable. There is no dispute that a Title VII plaintiff *may* establish a prima facie case by showing that he or she was disciplined for refusing to abide by an employer's non-accommodating rule. The Fourth Circuit, however, insists that this is the *only* method of establishing an accommodation claim--that proof of discipline is

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[1] *E.g., Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health & Human Services, Inc.*, 121 S.Ct. 1835, 1838 (2001); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S.Ct. 1678, 1682 (2001); *Carter v. United States*, 530 U.S. 255, 260 (2000); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999).

not only sufficient but also necessary to establish a prima facie case.

Respondent insists this Court and all the circuit courts to address this issue agree with the Fourth Circuit. But respondent mischaracterizes many of the opinions in question.

In *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986), this Court summarized the Second Circuit decision in that case as having held

> that a prima facie case of discrimination *is established* when an employee shows that "' . . . he or she was disciplined for failure to comply with the conflicting employment requirement.'"

479 U.S. at 65-66 (emphasis added) (*quoting Philbrook v. Ansonia Board of Education*, 757 F. 2d 476, 481 (2d Cir. 1985), *quoting Turpen v. Missouri-Kansas-Texas R. R. Co.*, 736 F. 2d 1022, 1026 (5th Cir. 1984)). The quoted passage from this Court's opinion does not assert that this is the sole way to establish a prima facie case, but only that (the Second Circuit had held) it is a permissible method of doing so. Respondent, however, describes this Court's decision in *Philbrook* as holding[2] that

> the framework for a prima facie case . . . *requires* an employee to show " . . . he or she was

---

[2]The quoted passage, in any event, is not part of either the holding or the reasoning of the Court in *Philbrook*. It is simply a summary of the proceedings in the lower courts prior to the grant of certiorari.

> disciplined for failure to comply with the conflicting employment requirement."

(Br. Opp. 11) (Emphasis added). But the word "require" simply is not in the decision of this Court in *Philbrook*, in the decision of the Second Circuit in *Philbrook*, or in the decision of the Fifth Circuit in *Turpen*.

Respondent's summary of the decisions in circuits other than the Fourth is also incomplete. For example, in *EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610, 614 n. 5 (9th Cir. 1988), the Ninth Circuit in fact expressly rejected the Fourth Circuit rule, holding to the contrary that "[a]n employee does not cease to be discriminated against because he temporarily gives up his religious practices and submits to the employment policy." Respondent makes no mention of this actual holding, instead insisting that under *Townley,* "[p]etitioner would *be required* to plead and prove that she 'was *penalized* in some way because of the conflict' (emphasis supplied). *Townley*, 859 F. 2d at 614 n. 5." (Br. Opp. 14). This partial quotation omits the immediately following sentence in *Townley*, which adds that "[t]he *threat* of discharge (or of other adverse employment action) is a sufficient penalty." 859 F. 2d at 614 n. 5 (Emphasis in original).

Respondent's summary of decisions in other circuits is in other instances overstated. *Compare Beadle v. City of Tampa*, 42 F. 3d 633, 636 n.4 (11th Cir. 1995) (defendant "does not dispute" that plaintiff's evidence, including showing of discipline, was sufficient to establish a prima facie case) *with* Br. Opp. 12 (under *Beadle* "prima facie case of religious discrimination *requires*" proof of discipline) (emphasis added); *compare Toledo v. Nobel-Sysco, Inc.*, 892 F. 2d 1481, 1486 (10th Cir. 1989) (quoting the passage from *Turpen* quoted by this Court in

Philbrook) ***with*** Br. Opp. 13 (under *Toldeo* "employee ***must*** prove" discipline) (emphasis added); ***compare*** ***Smith v. Pyro Mining Company***, 827 F. 2d 1081, 1085 (6th Cir. 1987) (prima facie case "is established" where a plaintiff, ***inter alia***, shows he was disciplined) ***with*** Br. Opp. 13 (under *Smith* "employee ***must*** show" discipline) (emphasis added).

(3) Respondent's efforts to distinguish this Court's sexual harassment decisions are unavailing. If Alamo had insisted that Ms. Ali do her work topless, there would be no question that such a requirement discriminated on the basis of gender. The violation inherent in a requirement that she work hijab-less is no different.

Respondent asserts that Ali "concedes that the terms and conditions [of her employment] were not violated." (Br. Opp. 17). That is not correct. What we conceded below was that there had been no "adverse employment action" as that phrase is construed in the Fourth Circuit, i.e. no dismissal or demotion. The difference goes to the heart of the issue in this case. The precise question decided by the Fourth Circuit, and raised by the petition, is whether refusing to permit a worker to engage in a religious practice--absent a disciplinary adverse employment action--constitutes discrimination in the terms and conditions of employment.

(4) Respondent appears to contend that the complaint failed to allege that Alamo had forbidden Ali to wear her hijab. But the complaint assuredly contains precisely that allegation. It describes petitioner as "a Muslim woman who was refused permission to wear a religiously-mandated head scarf at work" (Br. Opp. App. 1a ¶ 1). It characterizes as "intentional . . . and motivated by anti-Muslim sentiment" "Cooper's prohibition, on

behalf of Alamo, of Ms. Ali's wearing her head scarf." (Br. Opp. App. 3a ¶ 12). The complaint asserts "Ms. Ali complained of Mr. Cooper's prohibition to him and to his superiors at Alamo", but to no avail. (Br. Opp. App. 4a ¶ 13). And it explains that "Ms. Ali's acquiescence in Mr. Cooper's demand was in derogation of her religious obligations as she understood them." (Br. Opp. App. 3a ¶ 11).

Respondent apparently contends that what actually occurred in this case was that Cooper thoughtfully assured Ali that she could wear her hijab, and that he graciously accommodated her desire to dress differently than other workers by assigning her to a new job. (Br. Opp. 8-9). If Alamo can prove at trial that those are indeed the facts, it may prevail, although the supposed accommodation looks suspiciously like segregation on the basis of religion. But Alamo's description of what occurred is assuredly at odds with the express allegations of the complaint--that Cooper actually forbad the wearing of the hijab, and that his superiors refused to overturn that prohibition.

On a closer reading respondent may actually be asserting, not that there was no prohibition against wearing a hijab, but only that no Alamo official expressly told Ali that the sanction for violating that rule would be dismissal. (Br. Opp. 3, 8, 9). But such a contention, even if ultimately sustained by the trier of fact, is legally irrelevant. Any direction from a supervisor to a subordinate carries with it an unspoken threat of sanction; workers are fired every day for insubordination, and legitimately so. Employees such as Ali are not required to defy a directive until they are able to precipitate a specific threat of dismissal (or any other particular sanction); employers may well chose to fire such workers without issuing any such warning.

(5) Finally, respondent contends that some sort of procedural default occurred in this case. Alamo made this argument in the Fourth Circuit, but to no avail; the court of appeals instead proceeded to reach the merits of Ali's claims. If this Court were to grant certiorari and hold that Ali's complaint indeed alleged a violation of Title VII, respondent would be free to renew this procedural objection on remand.

The default argument, moreover, is palpably without merit. The complaint in this case alleges that Ali was compelled to stop wearing her hijab at work. The district judge concluded that under Fourth Circuit precedent such an allegation was legally insufficient. (Pet. App. 13a). The judge then granted Ali leave to amend her complaint to include the additional allegation required by that Circuit--that Ali, because she wore her hijab, had been fired, demoted, or otherwise penalized in a manner that constituted an "adverse employment action." (Pet. App. 14a). Ali's attorney declined to amend the complaint in this manner because no such "adverse employment action" had occurred.

Having filed a complaint squarely alleging that she had been forced to violate her religious beliefs rather than risk an adverse employment action, petitioner cannot conceivably be said to have then waived that claim when she declined an invitation to submit an amended complaint making the very different allegation that she had in fact been subject to such an adverse employment action. Federal litigants are not required to plead unprovable facts--in presumptive violation of Rule 11, Fed.R.Civ.P.--in order to preserve a separate meritorious claim.

CONCLUSION

For the above reasons, a writ of certiorari should be granted to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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RESPONDENT'S OBJECTION
TO MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*
BY THE AMERICAN JEWISH CONGRESS, ET AL.

Respondent, Alamo Rent-A-Car, Inc., by and through undersigned counsel, and pursuant to Supreme Court Rule 37(5), hereby objects to the Motion for Leave to File Brief *Amici Curiae* and Brief *Amici Curiae* of the American Jewish Congress, American Jewish Committee, Agudath Israel of American and the Anti-Defamation League in Support of Petition for Writ of Certiorari, by stating as follows:

REASONS FOR OBJECTION

Respondent objects to the Motion for Leave to File Brief *Amici Curiae* as the Brief offers no new or "relevant matters" which would aid the Court in determining whether to grant certiorari. Supreme Court Rule 37(1) specifically warns that the filing of *amicus curiae* briefs which do not serve this purposes are "not favored." It is for this reason, along with Counsel for *Amici Curiae's* failure to preview the arguments to be submitted that express

consent not given for filing a supporting brief. Supreme Court Rule 37(5).

In their proposed brief, *Amici* argue that the law is unsettled as to whether alleged discrimination must have an economic detriment with respect to the "compensation, terms, conditions or privileges of employment" in order to be actionable under 42 U.S.C. §2000e-2(a)(1). (*Amici* Brief at 3). *Amici* assert that the Fourth and Eight Circuits narrowly interpret the statute as being "economic-based," and request that this Court clarify the issue of whether an economic interest is a necessary component of a Title VII claim.

Suffice it to say that the issue contemplated by *Amici* is irrelevant to the proposed question presented in the Petition, and largely ignores the admissions by Petitioner at the district and circuit court level that she suffered neither an economic nor any other detriment to the terms and conditions of her *employment*. (Respondent's Brief at 5-7); *Ali v. Alamo Rent-A-Car, Inc.*, 246 F.3d 662, 664, fn. 2 (4th Cir. 2000). Further, *Amici's* interpretation of the Fourth Circuit's ruling is clearly a stretch. The Fourth Circuit neither considered, reviewed, nor discussed the alleged economic issue raised by *Amici*. In fact, the word "economic" appears nowhere in Fourth Circuit's decision.

The standard for Title VII claims does not turn on an "economic" or "non-economic" analysis as suggested, but rather whether the employer's practice affects the "compensation, terms, conditions, or privileges of employment" or whether the practice "deprive[s] any

individual of employment opportunities or otherwise adversely affect his status as an employee." 42 U.S.C. § 2000e-2(a)(1) & (2). This standard was reiterated just last term by this Court in *Clark County School District v. Breeden*, 121 S.Ct. 1508 (2001)(misidentified by *Amici* as "Carson County v. Breedon" at 5).

Contrary to *Amici's* suggestion that this Court needs to clarify this well settled standard, Respondent notes that this Court, has, in fact, recently addressed the alleged distinction in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998). Although discussed in the context of an employer's affirmative defense, the Court recognized that actionable (or tangible) employment actions are not limited to those involving an economic detriment. *Id.* at 762. This Court further provided some guidance on what amounts to an adverse employment action (none of which was alleged by Petitioner), noting that:

> The concept of a tangible employment action appears in numerous cases in the Courts of Appeals discussing claims involving race, age, and national origin discrimination, as well as sex discrimination. Without endorsing the specific results of those decisions, we think it prudent to import the concept of a tangible employment action for resolution of the vicarious liability issue we consider here. A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits....
>
> * * * *
>
> Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment action requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors....The supervisor often must obtain the imprimatur of the enterprise and use its internal processes....

Id.

In all, when stripped of the argument that the law is somehow unsettled in this area, *Amici's* Brief contains nothing more than hyperbole and inflammatory rhetoric about "back of the bus" segregation practices and sarcastic remarks intended to take the alleged acts of the supervisor in the underlying case far beyond what was ever pled.

For the foregoing reasons, Respondent respectfully objects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Karen A. Khan, hereby certify that three true and accurate copies of Respondent Alamo Rent-A-Car, Inc.'s Objections to Motion for Leave to File Brief *Amicus Curiae*, were mailed, first class postage prepaid, on this 30th day of July 2001, to:

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